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REPORTS OF CASES
ADJUDGED IN THE
SUPREME COURT

—OF—
PENNSYLVANIA:

WITH SOME SELECT CASES

—AT—
NISI PRIUS, AND IN THE CIRCUIT COURTS.

BY THE HON. JASPER YEATES,

ONE OF THE JUDGES OF THE SUPREME COURT OF PENNSYLVANIA.

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[Prepared by WM. DUANE, Esq., of the Philadelphia Bar.]

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SUPREME COURT

OF

PENNSYLVANIA.

AT A CIRCUIT COURT, AT LANCASTER, APRIL, 1800.

COORAM, YEATES AND SMITH, JUSTICES.

RESPUBLICA *against* JOHN MEYLIN, ROBERT MAXWELL and ADAM REIGART, jun., commissioners of Lancaster county.

Indictment will not lie against county commissioners for refusing to pay money allowed for a bridge by the sessions and grand jury, under the act of assembly of 15th August 1782, nor under the act of 11th April 1709, for a bridge erected before the passing of that law.

INDICTMENT for a misdemeanor, found at a Court of Oyer and Terminer. It stated, that the Court of Quarter Sessions of Lancaster county, having taken into consideration, the opinions of several grand juries, respecting a stone bridge built by Christian Binckley, over Conestogoe creek, did in August sessions, 1799, concur with the grand jury, in the appropriation of 1600*l.* out of the county stock thereto, the payments to be made in equal quarter-yearly instalments; that the said Christian, on the 28th November 1799, gave notice thereof to the defendants, then commissioners of the said county, and then tendered to them an indenture from himself and Elizabeth his wife, to them and their successors in office, for public use, for one perch of land round the heads of the said bridge, with free ingress, &c. Nevertheless the defendants refused to obey the order of the court, by refusing contemptuously to give appropriation to the said 1600*l.* and drawing orders for the same, &c.

It appeared in evidence at the trial, that the grand jury in August sessions, 1797, made a presentment, that part of the expenses attending the erection of the bridge, should be paid by the county, and laid before the next grand jury. That in November sessions following, another presentment was made, that

a reasonable sum should be allowed out of the county stock.— That in August sessions 1798, another presentment was made, refusing an appropriation for the time, the bridge being unfinished, and great sums wanted for public use, but recommending the measure to the next grand jury. That in November sessions 1798, another presentment was made, stating that the costs and expenses of erecting the said bridge, amounted in the whole to 4144*l.* 2*s.*, which were reduced by the grand jury to 3481*l.* 17*s.* from which deducting the sum raised by subscription 400*l.* there remained 3081*l.* 17*s.* towards which, the grand jury allowed the said Christian Binckley 1600*l.* to be paid out of the county stock, 800*l.* to be paid to him in six months, and the remaining 800*l.* in twelve months, on his executing a conveyance to the commissioners for the public use of one perch of land, round the heads of the said bridge, with free ingress, &c.

The justices in August sessions 1799, took up the consideration of the presentment of the grand jury, made at the preceding November sessions, and concurred therein, as to the appropriation of 1600*l.* out of the county stock towards Binckley's bridge, the payments to be made in quarter-yearly instalments.

In February sessions 1799, the presentment of another grand jury was made, concurring with that of the former sessions.

Mr. Montgomery for the defendants, insisted, that the act of 11th April 1799, (4 Dall. St. Laws, 517, § 24,) could not operate in this case. The commissioners were not empowered thereby, to purchase bridges already erected. The proceedings respecting the erection and repair of bridges, are minutely pointed out by this law. It confers a special authority which must be strictly pursued. Besides, if the 23d section should be supposed to relate to the following section, the indictment should have been preferred in the Court of Quarter sessions, and not in the Court of Oyer and Terminer. The act of 15th August 1782, (1 Dall. St. Laws, 283, § 3,) gives the commissioners and assessors a discretion as to the building of bridges, and this they are bound to exercise, according to the best of their own judgments. It is highly questionable, under the law of 1799, whether if the proceedings had been regular, the commissioners are punishable by indictment for refusing to execute the order of the sessions.

Mr. Hopkins for the commonwealth, argued, that whatever might be the powers formerly claimed by the commissioners as to the building of bridges, their authority was now merely ministerial. It is true, the presentment of the grand jury, on which the indictment was founded, was made in November sessions

1798, confirmed in February sessions 1799, antecedent to the passing of the law on the 11th April following. But those presentments with the three preceding ones, were substantial findings, that the bridge was necessary and conduced to the public benefit; and that on principles of justice and right, the county should bear a proportional part of the expenses incurred thereby. The presentments were continued under consideration by the justices, who acted under the last law, and both court and jury having approved of the bridge, it became the duty of the defendants to carry the measure into execution; for the refusal whereof they were criminally punishable.

As to the indictment being found in the Court of Oyer and Terminer, the present confirmation of the courts, afforded an answer to that objection.

By the court. The sufficiency of the charge, must depend either on the common law, or our own municipal acts.

At common law, there was no such office as county commissioners, and therefore under it, the indictment cannot be supported.

The first act of assembly respecting the erection of bridges, seems to be that of 1700. (1 Dall. St. Law, 19.) It directs, that the county courts, with the concurrence of the grand juries, shall appoint and agree with persons to build bridges, to be paid for out of the county stock.

The act of 15th August 1732, changes the law and declares, that the grand juries, commissioners and assessors with the concurrence of the Justices of the General Quarter Sessions of the Peace shall be the sole judges where any bridge shall be built, and the commissioners, assessors and justices shall agree with workmen, &c. The commissioners, acting judicially, under this law, are equally punishable with a grand jury, for refusing to agree to the building of a bridge. They are bound by the duties of their office, to exercise a sound discretion, when such matters come before them.

The late act of 11th April 1799, takes away the discretion of the commissioners, but directs the requisite steps to be taken in the building of the bridges at the county expense. This law is expressly confined to future cases, to bridges to be erected or repaired, on any public road. A petition must be given in to the sessions, stating the place, and circumstances of the case, with the probable expense: The court shall give the petition in charge to the grand jury, who shall consider of the propriety of erecting or repairing the bridge prayed for. And if the court and jury shall approve thereof, the court shall make an order, &c.

In the present instance, the bridge was finished before the law was enacted, and even before the presentment of the grand jury, in November 1798, and it was absolutely impracticable under the circumstances of the case, to render the law applicable thereto. Under this act therefore, the prosecution cannot be supported. And it is unnecessary to give any opinion on the point made, respecting the indictment being found in the Court of Oyer and Terminer. But the court have no difficulty in saying, that if the present case had been clearly within the provisions of the act of 1799, the commissioners would be punishable by indictment for neglect of duty, against the positive words of a law.

If the legislature had been less particular in the penning of this act, it would be a dangerous precedent, to subject a county to pay for bridges erected by individuals at their own will and for their own emolument, without the previous approbation of the public constituted authorities. Other interested persons would follow the example, and it would soon become a general evil.

Verdicts, *non cul.*

JOSEPH HEISTER assignee of JAMES OLD *against* EDWARD DAVIS.

Counsel or attorney shall not be permitted to disclose confidential communications of their client, but may give evidence of collateral facts, or that their client expressed himself satisfied with a new security.

DEBT on seven obligations. Plea, payment. The defence set up, was that the bonds in question, with six others, were the consideration of certain lands sold by Old to the defendant, free of all incumbrances, with a covenant of warranty in the deed, against Old and his heirs, and all other persons claiming under Edward Hughes, deceased, who died intestate. An appraisement of these lands had taken place in the Orphan's Court, as the property of the said Edward Hughes, and a confirmation thereof to his son James, and 737l. 10s. one-third part of the appraisement, remained charged on the premises to pay off the yearly interest due to the widow in lieu of her dower, which after her death was subject to distribution. To encounter this defence, the plaintiff showed in evidence a judgment entered in Philadelphia county, by James Old v. Benjamin Morris, debt 3650l.; the declaration therein being endorsed by the attorney

who confessed the same, "debt, interest, and costs, is for the security of Edward Davis." And he further offered to prove by Daniel Clymer, esq. who entered up the judgment, that he had received the bond, on which the judgment was confessed, from Old, by way of indemnity against the incumbrances on the land sold to the defendant. 18 or 19 months after the execution of the deed, that the judgment was entered at the repeated instances of the latter, and that he was fully satisfied with the security which had been obtained.

The defendant's counsel excepted to this testimony, and produced a receipt to him from Mr. Clymer for 4 guineas, for his services in endeavoring to secure the title of the lands. They insisted, that a trustee shall not be a witness to betray his trust, nor shall counsel or attornies be permitted to discover the secrets of their clients, though they offer themselves for that purpose. It is the privilege of the client, and not of the counsel or attorney. Bull. 284. 1 Stra. 140. It is contrary to the policy of the law to permit any person to divulge a secret with which the law has intrusted him, and the evidence attempted to be introduced, must have come to the knowledge of the witness in his character as counsel or attorney for the defendant.

E contra, it was urged, that an attorney has no privilege to refuse to give evidence of collateral facts. One has been obliged to prove his client's having sworn and signed the answer upon which he was indicted for perjury. If he has attested a paper as a witness, he may be committed unless he prove the execution of it. Cowp. 846. Nor was there any suit depending when these facts came to Mr. Clymer's knowledge. The privilege of not being compellable to divulge secrets professionally disclosed to them, is confined to the counsel and attornies in the cause only, and is not to be extended to others, though professionally and confidentially employed. 4 Term Rep. 753. Espin. 718.

Per curiam. It is of infinite consequence to suitors, that the trust reposed in professional characters should not be violated. But let our private feelings be as they may, we must take the rules of evidence as our only guides. See 4 Term Rep. 758, 759, 760. In *Annesley v. Lord Anglesea*, (9 St. Tri, 392, 3, 4,) this doctrine was very fully considered, though it must be owned, that one of the features of that case, was the criminal conduct on the part of Lord Anglesea, in urging a groundless prosecution against his adversary for murder. In *Cobden v. Kendeick*, (4 Term Rep. 432,) it was adjudged, that an attorney may give

evidence of a conversation between him and his client, touching the justice of his suit, after a writ of inquiry executed, and a compromise thereon. For the purpose of the suit was obtained, and it was *gratis dictum*. And in a late case, (Peake. 108, 77,) it has been held, that when anything has been communicated to an attorney by his client, for the purpose of defence, he ought not to divulge it. But were he is as it were, a party to the original transaction, that does not come to his knowledge in the character of an attorney, and he is liable to be examined.

Is not Old's lodging this bond with Mr. Clymer, by way of indemnity to the defendant, a collateral fact? May not Mr. Clymer account for the special indorsement on his declaration, and declare whether his client was fully satisfied with this new security, without disclosing any matter confidentially communicated to him?

The defendant perceiving the opinion of the court, waived his privilege, and desired that Mr. Clymer might be permitted to give in evidence everything he knew of the whole transaction, which was done accordingly.

Verdict *pro quer.* for 833*l.* 16*s.* 8*d.*

Messrs. C. Smith and Jacob Hubley, *pro quer.*

Messrs. Montgomery and Hopkins, *pro def.*

JACOB GREENWALT assignee of WILLIAM M. STERRET *against* JOHN BORN and SAMUEL ENSMINGER.

Defendant on the plea of payment to a bond, must specify the particulars of the defence as to want of consideration, fraud, &c., if required by the plaintiff or he shall be precluded from giving the same in evidence.

Where two conveyances are made for two tracts of land on the same day and one bond taken for the consideration, and the contract for one of the tracts is rescinded for defect of title, it lies on the vendee to, show some circumstances proving that he would not have bought the one without the other tract, in order to vacate the contract for the other tract.

DEBT 450*l.* *sur* bond conditioned for the payment of 225*l.* on the 1st June, 1798, the consideration of two tracts of land.

Plea payment, with leave to give the special matter in evidence.

The defendant's specification was general, that the title of the lands sold by Sterret to Born was not good.

It appeared in evidence, that on the 10th November 1797, Sterret executed two conveyances to Born, the first in consideration of 150*l.* for 407 acres and allowance, in Beaver-dam township, North

umberland county, surveyed to John Hassinger, jun. under a warrant dated 21st January 1793, who conveyed the same to Sterret; the second in consideration of 75*l.* for 146½ acres and allowance in the same township and county, surveyed to Henry Gross, under a warrant dated——— and returned into the surveyor general's office on the 27th September 1786, and which became vested in the said Sterret.

Mr. Hopkins, *pro def.* then offered to show in evidence the deposition of William Harris, taken under a rule of court on due notice given, proving that 190 acres and 88 perches, part of the 407 acres tract, were legally vested in Samuel Jeffries, under a warrant dated 28th April 1774, surveyed on the 26th August 1774, and in Mary Beard, under a warrant dated 11th July 1767, and surveyed on the 30th June 1768.

To this deposition Mr. Charles Smith for the plaintiff, objected, and showed a written notice which had been served on the defendant's attorney, requiring a production of all deeds, papers and affidavits, and the particulars of the special matters meant to be insisted on, dated 17th January 1799, and a second notice of the same kind, dated 2d March 1799, requiring a specification of the objections to the title conveyed, and notice of the adverse titles opposed thereto, that the plaintiff might answer the same.

He admitted that the different deeds and affidavits received by Born from Sterret had been produced to him in consequence of his notices, but insisted, that these papers did not furnish him with any information respecting the adverse title, and consequently he could not know what he was to repel.

On the part of the defendants, it was said that every information had been given which rested in their possession; that had the plaintiff attended the taking of the deposition in dispute on the 10th March last, he would have known every minute particular of the defence from the oath of the surveyor who had traced the different lines, and that the deposition when received could not be furnished to the plaintiff's attorney, who was then attending the Supreme Court in Bank.

By the court. The object of the 39th rule of the Supreme Court, (which is pursued by the 29th rule of this court,) was calculatee to prevent surprise at the trial, on the general plea of payment. These specifications under the rule, we know to be sometimes very general. But wherever the plaintiff requires the defendant to go into the

particulars of his defence, as to want of consideration, fraud, falsehood, or a suppression of the truth, he is bound to do it, otherwise the spirit of the rule is eluded. In general cases between obligor and obligee, the same detail may not be necessary as on specialties assigned, where the assignee is a stranger to the original transactions. Under the present circumstances, we cannot direct the deposition to be now read, because from the papers shown to the plaintiff's attorney, he could not collect the defence meant to be set up. If he had not been absent in Philadelphia, the deposition of Harris might have been shown to him for his information.

To prevent injustice in this case, we have adopted this expedient. Let the plaintiff's attorney examine the deposition, and see whether by gaining time, he can probably repel the adverse titles; if he thinks that he can, we will either adjourn the trial or discharge the jury, at his election; but should he be of a different opinion, it can answer no purpose to postpone the hearing.

It was hereupon agreed that the special matters should be laid before the jury, and the cause to proceed.

On the evidence being gone through, it was admitted, that the contract as to the larger tract should be rescinded; and it was then urged by the defendants that this should be extended to the smaller tract, lying about 12 miles distance from the former, the conveyances being executed on the same day, and one bond given for both.

Sed per cur. The *onus probandi* lies on the defendants, to show some circumstances inducing a reasonable presumption, that Born would not have bought the smaller tract, unless the larger could also be procured, such as, that the 407 acres were dependant on the 146½ acres for wood, water, &c. The distance between them precludes this idea. The contracts for each tract are distinct, and nothing is shown to impeach the title to the 146½ acres.

It was at length agreed that a verdict should be given for the plaintiff for 62½ 14s. after deducting 50 dollars indorsed on the bond paid, and that Born should release his right to the plaintiff for the tract containing 407 acres.

CHRISTIAN BAUGHMAN, (for the use of CHRISTIAN OVER and MARTIN and MARTIN KAPP) *against* DANIEL DIVLER.

A legatee in right of his wife, transfers the legacy and takes a bond therefore. He previously purchases goods of the executors of the testator, and they insist on retaining the amount against his assignee of the legacy. This may be given in evidence on the plea of payment, against the equitable assignee of the bond.

DEBT on bond conditioned for the payment of 500 dollars on the first February 1797. Plea payment, with leave, &c. tender and refusal.

The defendant's specification was as follows. The bond was given in consideration of the plaintiff's transferring to him a legacy devised to his wife Catharine of a residuary share of the estate of her father John Fissel, deceased, for 600 dollars, whereof he had paid 100 dollars, and given his bond for the residue; previous to the transfer, the plaintiff bought sundry articles of the executors of Fissel at public vendue, amounting to 39*l.* 7*s.* 9*d.*, which on the defendant's settlement with them was insisted to be retained out of the legacy, and was actually retained. He also relied on his pleas of tender and refusal. The defendant brought into court on the return of the process in the Court of Common Pleas, 395 dollars, on the 1st June 1797, which were taken out by Over and Kapp, to whom the obligation had been informally assigned, on the 25th September 1798.

Mr. Montgomery for the plaintiff objected to any testimony respecting goods sold to Baughman by the executors of Fissel. The defalcation act is confined to mutual debts in cases of the same right. If a suit was brought against the executors for this legacy, they could not set off the amount of the goods sold in such action, being in different rights. Bull. 175. Espin. 239. 1 Vez. 208. So neither can the obligor set up this sale as a partial defence. The now defendant may legally recover the whole of the legacy from the executors, *quâ* executors, and put them to their suit against the nominal plaintiff for the goods sold at vendue, wherein they must declare in their own rights, though derived through their executorship.

Mr. Hopkins for the defendant rose to answer the objection, but was interrupted by the court, who observed—

If a credit was given to the plaintiff at the vendue of the effects of the testator by the executors, on the ground of his being a legatee in right of his wife, and it was so understood at the time, the amount of the goods bought by him would be an actual payment *pro tanto* of the legacy. To prevent circuitry of action, courts of justice in England have lately been very liberal on the subject of set offs.

A debt due to a defendant as a surviving partner, may be set off against a demand on him in his own right. 5 Term Rep. 493. So a debt due from a plaintiff as a surviving partner to the defendant may be set off against a debt due from the defendant to the plaintiff in his own right. 6 Term Rep. 582. And it is obvious, and has often been remarked, that our defalcation act goes much further than the British statutes.

But the present defence is not set up on the ground of a set off; it rests on a defect of consideration, on a suppression of the truth on a part of the obligee, whom the equitable assignees v. Morris, determined at last December term, on a motion for a new trial, after the fullest argument. The plaintiff here has sold his entire interest in the legacy bequeathed to his wife, and has concealed the circumstance of his having previously received a part of it, by the purchase of personal assets. On the plainest principles of common honesty the evidence must be received.

The defendant examined his witness, but not being able to establish a sale of the goods, a verdict was directed to be given against him for 67*l.* 2*s.* 7*d.* the full balance.

GEORGE M'CULLOUGH and ISABELLA his wife *against* JAMES ALLEN,
JOHN LICK and BENJAMIN COBURN.

To bar a widow of dower by a devise, it must be either so expressed, or there must be a strong and necessary implication to that effect, or it must be inconsistent with or repugnant to her claim.

DOWER of 7 messuages, 2 barns, 7 gardens, 2 orchards, 30 acres of meadow, 500 acres of arable land, and 200 acres of woodland, in Little Britain township.

The tenants pleaded a devise given by the last will of Thomas Grubb to Isabella the demandant, his widow, and excepted by her, in lieu of her dower at common law (*prout* will.)

The substance of the will was as follows: The testator gave to to his son in-law Joseph M'Creary and Ann his wife 25*l.*, and to his son in-law Alexander Laughlin and Charity his wife, the like sum of 25*l.* and to his daughter Prudence 150*l.*, her mare, saddle, bridle, bed and furniture. To his son Joseph Grubb, his heirs and assigns, a certain tract of land marked out for him in the presence of witnesses. To his daughter Jane 150*l.*, a good mare, saddle and bridle, bed and furniture, when she came to the age of 18 years. To his sons, John Thomas, William and Benjamin Grubb, and their respective heirs and assigns, certain other tracts of land marked out

for them respectively in the presence of witnesses. To his son James Grubb 300%. And then came the following clauses: "And further it is my will, that if any one of my sons depart this life before their marriage, or arriving at the age of 21 years, I order that his tract of land be given to my son James Grubb, his heirs and assigns, and the 300%. I left to him the said James, to be equally divided amongst the rest of my sons; and further if the said James depart this life before his marriage, or arriving at the age of 21 years, the money to be equally divided amongst the rest of my sons; and further, if my daughter Jane depart this life before her marriage, or arriving at the age of 18 years, then her 150%. to be equally divided between my wife and sons. And further, I give unto my well beloved wife Isabella Grubb, the remaining part of all my personal estate, and the benefits of all my real estate, till my sons come of age to enjoy their possessions." And finally he appoints his wife Isabella his sole executrix.

The demandants replied, that the said devise was not given or accepted by the said Isabella in lieu of dower. This action had been originally brought against all the tenants of the lands whereof the testator died seized; but the deaths of Alexander Ewing, (who had bought John Grubb's tract and part of Thomas Grubb's tract,) and John Jones, (who had bought James Grubb's tract, and the residue of Thomas Grubb's tract,) two of the tenants, were suggested on record; and consequently the tract devised to Benjamin which he had conveyed to Allen, Lick and Coburn, only came in question.

William Grubb died in his minority, and James his brother succeeded to his tract, who sold to John Jones.

Benjamin Grubb came of age on the 31st March 1796, and then came into possession of the tract devised to them.

It appeared that this farm was of the yearly value of 30%. and a verdict passed for the demandants, with 40% damages, subject to the court's opinion on the point reserved, whether the devise to the widow did not bar her dower.

The court, after consideration of the case in their chambers desired that the defendant's counsel would produce the authorities on which they relied.

The counsel on both sides declined arguing the point; but those for the defendants barely referred to the decision of the Supreme Court in *Hamilton v. Buckwalter*, in December term 1798, and wished the judgment of the court might be deferred until the next September term.

This however, the court refused, declaring that they conceived it to be an impropriety to postpone giving their judgment, when they entertained no difficulty in their own minds. The counsel had it in their power to appeal to the Supreme Court, if they were dissatisfied with the opinion of the justices now present, upon giving the certificate prescribed by the late circuit law. 4 St. Laws. 362, § 4.

The demandant's counsel then prayed the opinion of the court.

By the court. After the very full consideration which has been given to the case of *Hamilton v. Buckwalter*, it would be a waste of time now to cite decisions respecting the right of dower, where the former husband has made a devise to his widow. Most of the cases in the books, were cited in that cause by the judges, who gave their opinions *seriatim*, after long advisement. There the judgment was rendered in favor of the tenant. But the present will is very dissimilar from that of *John Patton*, on which the determination rested. The devise to the widow, was "of all his lands in Lampeter township, during her natural life of widowhood, she making no waste thereupon; but in case she married, she was then to leave the plantation, and to receive 50*l.*, a horse and saddle, with her bed and bed clothes." A freehold estate was actually devised to her, and upon the determination thereof, she was to relinquish the land and receive a sum of money and sundry specific articles as an equivalent.

Considering the present will as a simple question of intention, it is but mere conjecture to say, that the testator intended to bar her of dower by the devise "of the benefits of all the real estate, till his sons came of age to enjoy their possession." There is no strong and necessary implication, that the widow should not have both her devise and dower. The mind in such a case, must be free of all doubts. The devise to her is not inconsistent with, or repugnant to her claim of dower, which the bounty of the law gives her. And on the fullest reflection, we cannot perceive that the case before us is so circumstanced, as to justify a deviation from the general rule of law; and therefore find ourselves constrained to give judgment for the demandants.

Brackenridge, J. was present and concurred therein.

Messrs. Hopkins and C. Smith for the demandants.

Messrs. Kittera and Montgomery for the tenants.

AT A CIRCUIT COURT, AT WEST CHESTER, MAY 1800.

CORAM, SHIPPEN, CHIEF JUSTICE, AND YEATES.

JOHN HARE *against* JOSEPH FURY.

Generally in trespass, the plaintiff may recover mesne profits for such time as the defendant may have been in possession ; but in the case of jointt-enants, or tenants in common recovering in ejectment, they are restricted to a reasonable time after judgment.

THE plaintiff declared in trespass for mesne profits of two fifth parts of two parcels of land, situate in New London township, from 10th May 1780 to 10th September 1795. The defendant pleaded not guilty and the statute of limitations.

The plaintiff showed the record of an ejectment brought by his nominal lessee against the defendant, wherein a demise was laid on the 10th June 1788 for seven years. The suit had been removed into the Supreme Court, and on a *distringas* being issued for a jury at Nisi Prius on the 9th May 1791, the defendant admitted on record, that the lessor of the plaintiff was entitled to two fifth parts of the land in question, and consented that judgment should be entered for him for that proportion of the lands, the plaintiff paying costs.

The writ in the present action issued on the 10th September 1795, and the plaintiff admitted that he was barred by the limitation act from recovering damages prior to the 10th September 1789, but contended that he was entitled to mesne profits from that period until the time of his coming into possession, shortly before the commencement of this suit. A writ of possession, had been taken out in the ejectment, returnable to January term 1792, but it did not appear to be executed.

The defendant's counsel objected that the plaintiff should not profit by his own laches. He had it in his power to compel the defendant to let him into possession, and if he has chosen to delay his appropriate remedy, he shall not reap the profits of the labors of his partner in the land. Beyond the time laid in the demise in the ejectment, the verdict proves nothing : there is no difference between a verdict in ejectment, and a judgment by default or by confession. 2 Burr. 668. Mesne profits can only be recovered between the time of demise and recovery in ejectment. 15 Vin. 395, pl. 4. 1 Lit. Pr. Reg. 596. No evidence of profits can be received beyond the term originally declared for. 1 Dall. 172.

On the part of the plaintiff, it was said, that a tenant in common might clearly support trespass for mesne profits, 2 Wils. 115, and in the reason of the thing, his right to compensation must be co-extensive with the adverse possession of his companion. His redress should be proportioned to the injury he has received. The recovery in the case cited from Lilly, must mean an execution executed ; it cannot be understood of the verdict, 2 Wils. 121, because injustice would be done in many cases at *Nisi Prius*, where judgments are not rendered for several months afterwards. Where the judgment is against the tenant in possession, and trespass is brought against him, it is sufficient to produce the judgment, without proving the writ of execution executed, because by entering into the common rule, the defendant is estopped both to the lessor and lessee ; *aliter*, where judgment is entered against the casual ejector. 1 Stra. 5. Bull. 87. The action for mesne profits is like trespass, with a *continuando*, 2 Barnes 368, Stanynought v. Cosins ; and in trespass, the plaintiff shall not be compelled to bring separate actions for every day's separate offence. 2 Rol. Ab. 545. 1 Ld. Raym. 240. Here the period complained of is within the term laid in the ejectment.

By the court. After a recovery in ejectment, the general rule is, that the plaintiff may recover mesne profits against the defendant for such length of time as he can prove him to have been in possession ; if he goes beyond the time laid in the demise, the defendant, may controvert his title, or may plead the statute of limitations, if the plaintiff attempts going back above six years. Bull. 87, 88. But a natural distinction presents itself in the case of one joint-tenant, or tenant in common recovering the possession against their partners on an actual ouster. The defendants in such instances hold undivided interests and cannot be compelled to relinquish the entire possession. It was incumbent, therefore, on the plaintiff, to obtain possession under the proper writ, or otherwise, in a reasonable time after judgment in the ejectment ; and if he is remiss herein for years, he shall not charge the defendant as a trespasser. Here the judgment was absolute at *Nisi Prius* on the 9th May 1791, and allowing one month thereafter as a reasonable time for obtaining the service of a *habere facias possessionem* the plaintiff is entitled to mesne profits from the 10th September 1789 to 9th June 1791, being $1\frac{1}{2}$ years, and for no longer space of time.

Verdict *pro quer.* for 35*l.* damages.

Messrs. T. Ross and Hemphill, *pro quer.*

Messrs. M'Kean and Porter, *pro def.*

JOHN KENNEDY against THOMAS RUSTON KENNEDY.

On a will dated in June 1778, devising a legacy of 500*l.* it is the province of auditors and not of a jury to determine whether the depreciation act applies thereto.

DEBT, *sur* legacy. Plea, payment, with leave, &c.

John Kennedy, the father of the parties, by his will, dated 15th June 1778, devised to the defendant, his eldest son, two fifth parts of his estate, real and personal, he paying to his brother John 500*l.* when he should become of age. To his daughters Mary and Sarah, and to his son John, each, one fifth part of his said estate, and to the Presbyterian Charlestown Congregation 15*l.*, together with 5*l.* in the hands of David John, provided they should therewith surround their graveyard with a stone wall.

Mr. T. Ross for the plaintiff contended, that it was evidently the intention of the testator to put his sons in a state of some equality, therefore intended the 500*l.* as specie. Mr. Hemphill for the defendant insisted, that the testator, being a warm advocate for the money emitted by congress, and having had no dealings in hard money during the revolutionary war, must be supposed to mean the bills of credit then in circulation.

By the court. This is mere conjecture on both sides. Nothing can be inferred with certainty *ex visceribus testamenti*, the only circumstance of any moment being the inadequacy of 20*l.*, (at four for one,) to inclose a church-yard with a stone wall. But the testator here, has not expressed his meaning, in what species of cash this 500*l.* should be paid; and are the court and jury to make a guess at the justice of the case, without sure *data*? This case appears to be within the meaning of the depreciation act of 3d April 1781. 1 Dall. St. Laws, 880. It is "a debt or demand, incurred between the 1st January 1777 and the 1st March 1781." It is a dispute about depreciation singly. 1 Dall. 248. Auditors under the act possess the authority of examining the parties on interrogatories, and can with more facility investigate "the nature and circumstances of the case." From former wills of the testator, his usual habits, expressions respecting his family, &c., they may be enabled to form a correct judgment of his intention: they have powers which we do not possess.

Yeates, J. added, that the case of *Levan v. Fry*, at Reading, was determined on the same principles.

The court discharged the jury, and nominated auditors, which were struck by both parties.

DAVID CHALFONT, assignee of FRANCES Goodwin, one of the executors of MARY GOODWIN *against* CALEB JOHNSTON, surviving executor of ROBERT JOHNSTON.

Suit by assignee of a bond, assigned by one executor of the obligor against the other executor, who was also the surviving executor of the obligor, may be supported unless the formality of the assignment is pleaded in abatement.

Quære, If so pleaded, whether such suit is not maintainable in Pennsylvania from necessity of the case.

DEBT 148*l.* on bond. Pleas, payment with leave, &c. *plene administravit* and want of assets.

The facts turned out on evidence, as follow. The bond was dated 27th October 1768, conditioned for the payment of 74*l.* within one year, with legal interest. Ten different sums were indorsed, paid on account of interest, the last bearing date on the 12th October 1780.

Robert Johnston, the obligor, made his will on the 26th July 1769, and thereby appointed Caleb Johnston, the now defendant, and Simon Johnston, since deceased, his executors, and soon afterwards died.

Mary Goodwin, the obligee, made her will on the 27th November 1782, and thereby appointed Frances Goodwin and the afore-said Caleb Johnston her executors.

On the 17th January 1792, the said Caleb Johnston settled his administration account on the estate of the obligor, in New Castle county, in the state of Delaware, whereby there appeared a balance in favor of the accountant of 477*l.* 7*s.* 1*½d.*

And on the 15th July 1796, Frances Goodwin assigned the obligation to the plaintiff.

Mr. Hemphill for the defendant insisted, that the present suit could not be supported by the plaintiff as assignee, Caleb Johnston one of the executors of the obligee not having joined in the assignment. It was the folly of Mrs. Goodwin to nominate him her executor, who was one of the executors of her obligor, and known by her to be such.

Per cur. The testatrix might not have known this fact, but at any rate, if this technical nicety was intended to be insisted on, it should have been pleaded in abatement, like the case of part owners not sued. 2 Bla. Rep. 696, 947. 5 Burr. 2618. 5 Term Rep. 651. Perhaps it would be difficult, if not impracticable, to have given the plaintiff a better writ. Caleb Johnston was not compellable to join in the assignment, nor could he be reasonably expected to join in a suit against himself. Under such circumstances, a bill would certainly be supportable in Chancery against the now defendant. Courts in this

state adopt the rules of equity, which form a part of our law. We are not necessarily called on to say in the present instance, how far we should feel ourselves obliged to follow the practice of a Court of Chancery, to prevent injustice, if even a plea in abatement had been put in to the form of the assignment.

It appearing afterwards, that Johnston's executors had paid legacies to a greater amount than the balance found due to them on their account, and the sum due on the present obligation, it was agreed that a verdict should be given for the plaintiff for 148*l.* debt, 22*l.* 16*s.* 4*d.* damages, and six pence costs.

Mr. T. Ross, *pro quer.*

AT A CIRCUIT COURT, AT NEWTOWN, JUNE 1800.

CORAM, SHIPPEN, CHIEF JUSTICE, AND YEATES.

STEPHEN SHEWEL, who survived JOSEPH SHEWEL, *against* JOSEPH FELL, Esquire, late sheriff of Bucks county.

In debt against a sheriff for an escape, evidence that he did not arrest the prisoner till three days after the return of *ca. sa.* which he had returned in custody, is not admissible. The stat. of 13 Ed. 1, c. 11, & 1 Ric. 2, c. 12, concerning escapes, extend to Pennsylvania. In debt for an escape from *ca. sa.* the jury must find the whole debt and costs.

DEBT 933*l.* 14*s.* 7*d.* for an escape. Plea *nil debt* and issue.

It appeared, that the plaintiff as surviving partner, recovered judgment against Robert Shewel, and issued *fiery facias* thereon to August term 1795, which was returned "*nulla bona.*" He afterwards took out a *capias ad satisfaciendum*, returnable to August term 1796, debt 928*l.* 7*s.* 2*d.* costs 5*l.* 7*s.* 5*d.* which was returned by the now defendant then sheriff "*cepi corpus et committitur.*" This *ca. sa.* issued on 18th July 1796, but it did not appear when the defendant received it.

It was proved that Robert Shewel was seen at large, walking by himself in Newtown, on the 3d day of August term 1796; and in the afternoon of that day he was confined in gaol. He applied during the term for the benefit of the insolvent acts, and upon giving notice to his creditors, his discharge was opposed by the plaintiff's counsel, but it was then declared that the escape was intended to be insisted on. The court on argument, discharged him, without taking the escape into consideration.

The defendant offered to show, that he did not take Robert Shewel on the *ca. sa.* until the 3d day of the term, being on Wednesday ; but the counsel of the plaintiff excepted thereto, as it would contradict the sheriff's return. It was said also, that this should have been pleaded and the plaintiff might have demurred thereto, or taken issue thereon. In the latter case, it was possible the evidence might be admitted.

In support of the testimony, the defendant insisted, that a favorable construction was to be put on escapes which are so highly penal to sheriffs and gaolers. 3 Co. 44, *a, b.* A sheriff cannot arrest a party after the return of the writ. 2 H. Ala. 29. And he cannot be charged with an escape, before he has taken him by a legal authority. 2 Bac. 236. If he arrests him on Sunday, he is not so chargeable. 6 Mod. 95. 1 Salk. 78. Where a sheriff returned on a *ca. sa. quod cepit corpus*, and no debt being brought against him for the escape, he pleaded *quod non arrestavit*, on which issue was taken ; it was adjudged, that the sheriff was not estopped by his return, though the court might amerce him. *Mitchel v. Henning*, cited by counsel *arguendo*. 2 Rol. Rep. 57, 58. S. C. 10 Vin. 117, pl. 36. It would seem therefore, that the sheriff's return is not conclusive, but that the same may be avoided by other proof.

Per cur. In the last case, the plaintiff's counsel took issue on the point of the arrest, which let in the proof. But he certainly might have demurred to the plea. The admission of the testimony contended for would be productive of the most injurious consequences to suitors. The sheriff in effect denies hereby his own return on record. If on a *feri facias*, he endorses " goods levied, to the value of the debt and costs," or " levied, sheriff for debt and costs," it cannot lie in his power to disaffirm his returns. Even if one becomes security to the sheriff in a bail bond, he shall not be allowed to say that the sheriff did not arrest the principal. 1 Stra. 444, 643. The sheriff by his indorsement on the *ca. sa.* has concluded himself, as to his having the person of the debtor in his custody, on the return day of the writ. The evidence must be overruled.

The defendant's counsel then contended, that this was a hard action, founded on two antiquated statutes, the extension whereof to this state was highly questionable. At common law, case only lies for an escape, wherein the jury might on a full consideration of all circumstances, give such damages as the party had really sustained by the misconduct of the officer. The first statute which gave an action of debt in such a case was 13 Ed. 1, c. 11, (called Westm. 2,) and the second was 1

Ric. 2, c. 12, which though it mentions only the warden of the fleet, yet has been extended by construction to all gaolers. Under this latter statute, it is said that the party who suffers by the escape, shall have the same remedy against the gaoler which he had against the debtor. 2 Term. Rep. 132.

Our local situation differs greatly from England, which is an old settled country. Our sheriffs have not the castles and fortresses of the ancient viscounts. The strictness of practice to which the officers of Great Britian have long been accustomed, would ill suit our government. It is apprehended, that these principles were supported by the late Chief Justice, in the case of Benjamin Fuller v. James Asb, esq., tried in bank, September term 1795, wherein the defendant's counsel took great latitude, and gave in evidence without opposition, the intentions of the creditors to release Captain Southern, the prisoner, his great indigence, the insufficiency of the gaol, and fresh pursuit made after him. A verdict was there given for the defendant, with liberty to move for a new trial. But the matter had been since dropped.

Why ought not the jury here to be left at liberty to find what damages they conscientiously deem to be just? The only question would be in justice, has the plaintiff sustained any loss by the misconduct of the defendant in office? Robert Shewel was so poor that nothing could be extracted from him on the *fi. fa.* Two days earlier confinement would not have added to his ability to pay this large debt. In an action against an attorney for negligence, by reason whereof the plaintiff's debtor was superseded from the custody of the marshal, there was a recovery of 500*l.* instead of 3000*l.* the whole debt, according to a former verdict, had in the same cause. Russell v. Palmer. 2 Wils. 328. And it was well observed by Erskine, that it is strange the nature of the action should alter the right of the parties, or the law upon the subject. Though formerly the courts were rather strict in actions of debt, it is not now necessary that the plaintiff should recover the whole sum demanded. 2 Bl. Rep. 1221. Doug. 6, 703, n. 4. 2 Term. Rep. 129. If this had been an action on the case for the same cause, it cannot be denied but that the jury might give only nominal damages. At law in an escape against the marshal, he has the prisoner's equity, and may give in evidence his poverty, &c. 2 Vern. 89. If the court should incline against the defendant on both points, it is requested, that the same should undergo a further investigation, before all the judges.

E. contra, for the plaintiff. A more full discussion before all the

court, is not objected to, in any shape which may be deemed proper, on account of its importance.

As to the statutes of Westm. 2, and 1 Rich. 2, c. 12, there can be little doubt of their extension. They have always been practised under; and it is of as much moment to the citizens of Pennsylvania to restrict the officers of justice to a proper discharge of their respective duties, as to the subjects of Great Britain. Those acts are highly fitting to our local situation. No determination was given by the court in the case of *Fuller v. Ash*, and the verdict has been thought to rest on the insufficiency of the gaol, after repeated notice to the commissioners of Philadelphia county, and the declared intentions of the prisoner's creditors to enlarge him. Escape lies either against the sheriff or gaoler. 1 Salk. 18. One in custody and seen at large afterwards, the sheriff is chargeable for the debt. He should be kept *in arcta et salva custodia*; his confinement is his punishment, and the only satisfaction he makes to his creditor. 3 Bl. Com. 415. Debt lies against a sheriff for an escape to recover the whole debt and damages, if a defendant taken in execution be afterwards seen at large, for any the shortest time, even before the return of the writ. 2 Bl. Rep. 1048. In this case, *Russel v. Palmer* was cited by the defendant's counsel, but De Grey, C. J. remarked thereon, that it was not the case of an escape. *Ib.* 1050. Besides that suit was not brought in debt, but case. The reasoning of Erskine is contradicted by Buller, J. in the page cited and the following one. The true ground is, that the statutes gave an action of debt against the sheriff or gaoler, to recover at once the sum for which the prisoner was charged in execution."

The dictum of the Lord Chancellor in 2 Vern. 89, can only refer to an action on the case brought for an escape on mesne process; in which it is clear that the officer may take advantage of his prisoner's inability to pay. A voluntary escape cannot be purged by a fresh pursuit. 3 Term Rep. 392.

Shippen, C. J. in his charge to the jury, observed, that this possibly might be a hard case on the sheriff. But the policy of the law has introduced general regulations, which must necessarily govern all cases, though in the event, individuals may be affected thereby with some degree of rigor. All officers in public employments, who receive emoluments for their services, are bound to perform their relative duties under certain penalties. The office of sheriff is of the utmost importance to the due administration of both criminal and civil justice in governments constituted like our own. It is his duty to perform his several

functions with firmness and integrity, and faithfully to execute all process directed to him, without favor or affection. He has no power arbitrarily to constitute himself a judge of the rights of suitors, and disappoint judgments and executions. Should such a practice prevail, and receive the sanctions of courts and juries, the injurious consequences attending it are very evident.

The common law and such of the statute laws of England as were enacted before the settlement of the late province, applicable to our local situation, have been adopted here, both before and since the revolution. 1 Dall. St. Laws 133, 723. 2 Dall. Rep 394. They form a part of our code, under certain modifications sanctioned by the judicial authority. The English decisions, however, do not universally comport with our circumstances. Such is the case as to promissory notes wherein we do not adopt their strictness of notice of non-payment by the drawers, so as to charge the indorsers. So the sheriffs in England are bound to see to the sufficiency of their gaols; but it is presumed, that here, if they or their gaolers are in no default, but use every due and proper precaution to prevent their prisoners from escaping, and yet an escape takes place from the manifest insufficiency of the gaol, (as in the instance of log buildings of the frontier counties, &c.) the penalty could not be exacted; more particularly, where the commissioners of the county have been previously apprised of such defects.

At common law, case lies for an escape, wherein a jury assess damages, according to all the existing circumstances. Under the statutes cited at the bar, the plaintiff is entitled to recover in an action of debt for the escape of his debtor out of execution against the sheriff, or gaoler, "in the same manner as he could have done against such debtor." We have always understood, that these statutes have extended to this commonwealth, and that they have uniformly considered as beneficial general provisions, suitable to the state of our country. We can see no circumstances in the present instance which will justify a departure from the settled and established rules of law, but are bound to pronounce it to be an escape, for which the defendant is answerable for the whole debt and costs. It is the province of the court to judge in what cases the rules of the English common law should be relaxed. Should juries assume this power, the necessary consequence would be, that the utmost uncertainty must ensue from the fluctuating opinions of different sets of jurors in different counties. The strong inclination of our minds is, that the statutes of Westm. 2, and 1 Ric. 2, c. 12, extend here, and that the plaintiff in point of law ought to recover his

whole debt in the present action. But the court will not be ashamed to retract their opinions at a future day, if they should find that they have conceived them erroneously.

The jury retired and staid together all night. Next morning they came into court, and said they found it impossible to unite in a verdict. They asked the court, if they might not judge of the escape and moderate the sum according to all the circumstances. They were told, the escape was a simple question of law on the facts being ascertained, binding on the court and their consciences. The court however recommended a compromise to the counsel, declaring that they felt as men for the defendant's situation, though they would not shrink from their duty as judges. This was unavailing.

The court then told the jury, that as at present informed, they persisted in their former opinion, that a verdict ought to be rendered for the plaintiff for the whole debt and costs.

The jury then again retired, and in the course of half an hour, found a verdict for the plaintiff for 933*l.* 14*s.* 7*d.*, which the court publicly approved of.

Judgment was rendered for the plaintiff, on the verdict, without prejudice to the defendant, on appeal on the legal points. 1st, Whether the parol evidence as to the time of the arrest ought not to have been received? 2d, Whether the statutes of Westm. 2 and 1 Ric. 2, c. 12, do extend to Pennsylvania? 3d, Whether the jury could not have awarded less than the original debt and costs?

Mr. T. Ross, *pro quer.* Mr. Condy, *pro def.*

This appeal was argued on three different days in the Supreme Court, viz: December 30th, 1802; March 17th, 1803; and December 23d, 1803; and the judgment was afterward affirmed by the whole court, March 24th, 1804.

AT A CIRCUIT COURT, AT EASTON, JUNE, 1800.

CORAM, SHIPPEN, CHIEF JUSTICE, AND YEATES.

Lessee of WILLIAM BELL *against* ROBERT LEVERS.

[S. C. 4 Dall. 210]

Letter of a deputy surveyor to his assistant to make a survey, is good *prima facie* evidence, though not proved to have been delivered, and the survey has been made after the death of the deputy ; but it may be repelled by other proof.

The authority of an assistant surveyor should not be too nicely scrutinized after a great lapse of time.

A survey of other lands on a lost location is of no more efficacy than a pocketed application until it be returned.

The limitation act of 26th March 1785, will not bar a recovery on a descriptive warrant without a survey, where proper application has been made for a survey and the party has been prevented therefrom by a *caveat*.

A decision of the Board of Property may be fully questioned at law.

EJECTMENT for seven tracts of land on Leekawaxen creek, in Upper Smithfield township, containing 2100 acres.

The plaintiff founded his pretensions on an application made by John Seely, dated September 6th 1766, for 300 acres of land on Lackawack, adjoining Jonas Seely, and a survey thereon said to have been made by the said "John Seely, on the 21st July 1772, of 297 acres 28 perches, and returned by him by order of James Scull, D. S."—Also, on the following four warrants, dated 29th November 1774 ; one to Robert Towers, for 300 acres, adjoining John Seely to the north of his tract, about three miles above the falls, on the main branch, and about eight miles above the Indian Orchard, in Northampton county ; one to Benjamin Horner, for 300 acres, adjoining Robert Towers, on the main branch of Leekawaxen creek ; one to John Minshall, for 300 acres, adjoining Benjamin Horner, on Leekawaxen ; and one other to John Morrison, for 300 acres, adjoining John Seely to the south of his land, down Leekawaxen, on the main branch. Likewise on two warrants, one dated February 23d 1775, to William Roberts, for 300 acres, adjoining John Morrison to the south, on the branches of Leekawaxen ; and one to Amos Taylor, for 300 acres, on the Leekawaxen, adjoining William Roberts, on the south side of his tract.

Seely conveyed his application and surveyed to Towers in consideration of 30*l.*, on the 19th May 1775, which together with the warrants by sundry mesne conveyances, for valuable considerations, became vested in William Bell.

On the 1st December 1774, Robert Towers paid 102*l.* into the surveyor general's office, on the first four warrants ; and on the 18th August 1775, William Roberts paid 45*l.* 15*s.* into the same office, on the two last warrants.

The defendant claimed under six applications, whereof two were dated 4th August 1765, one in the name of John Williamson, for 300

acres, at a place called Elamus Seat, upon the main branch of a creek, running out of the Great Swamp over the Blue Hills ; the other in the name of Joseph Dean, for 200 acres, about a mile below Elamus Seat ; and four others, dated 14th August 1765, each for 300 acres; adjoining each other, at or near Elamus Seat.

It appeared that the lands in controversy were about seven miles distant from Elamus Seat, (commonly called the Indian Orchard,) referred to in the defendant's locations, and about four miles distant from the plaintiff's leading application in the name of John Seely, but the warrants were sufficiently descriptive of the disputed grounds. John Seely and Robert Levers originally intended to have taken up the Indian Orchard and adjacent lands, but an early warrant, dated 30th July 1765, for 10,000 acres, having granted to Jonas Seely, the same were surveyed to him and returned.

This John Seely acted as an assistant to James Scull, the deputy surveyor of the district, who wrote a letter to the former, dated 1st October 1772, directing him to survey such lands for the said Robert Levers, (who paid for a discovery of the lands in the applications,) as he should direct, and in the manner in which he chose to have the laid out.

Seely afterwards, at the expense of Levers, and under the directions of a person whom he had employed, on the 22d May 1773, shifted the orders of survey and executed the same on the lands in dispute, by running the outlines thereof, but made no return thereof into the surveyor general's office, nor was he applied to for that purpose.

It did not appear, when the survey said to have been made on the application of John Seely, was returned into the office of the surveyor general ; but it was ascertained by a variety of concurring circumstances that it could have been made on the 21th July 1772 but was taken, fraudulently by him from the survey he had made for Levers in May following.

Very early in 1775, Robert Towers, who then owned the first four warrants, applied to the deputy surveyor of the district to execute the same, but he could not effect it, though he wrote to the said John Seely for that purpose.

On the 30th March 1775, Robert Levers entered a *caveat* against any surveys being made on the warrants of Towers on the waters of Leekawaxen, alleging that the lands had been surveyed at his expense by John Seely on prior rights. A hearing thereon was afterwards directed to be had on the 7th August 1786, which by two postponements came on upon the 2d June 1794, when the Board of Property decided in favor of Levers, on the ground of his having the first surveys under prior rights, and ordered that the deputy surveyor should resurvey the lands for him on his applications, and make return for his use.

James Scull aforesaid, the deputy surveyor, died at Reading, on the 31st December 1772, and was succeeded by Jasper Scull, who died the latter end of May 1773, but it did not appear that John Seely ever acted as an assistant to him. George Palmer was his successor.

The plaintiff's counsel objected to the reading of the aforesaid letter of James Scull in evidence. No proof has been given of its delivery by any one to Seely, or that the surveys were made in consequence thereof. The authority under it expired on the death of James Scull, and Seely made no surveys for Jasper Scull, his successor in office.

Sed per cur. The letter is good *prima facie* evidence and may be read. Its legal operation, however, may be fairly questioned, and it may be repelled by other proof.

After a full argument by Messrs. W. Tilghman, Biddle and Condry, for the defendant, and by Messrs. Ingersoll and Hopkinson for the plaintiff, the Chief Justice observed in substance to the jury, that the authority of John Seely to make the surveys on the defendant's applications, should not be too nicely scrutinized after so great a lapse of time as 27 years. He publicly acted as the assistant of James Scull, and might not have known of his death in May 1773, in which case his acts would be validated; or transacting business under a reputed authority, it might be presumed that he was the agent of Jasper Scull, though it does not now appear.

The fatal exception to the defendant's title consists in his not obtaining a return of his surveys into the surveyor general's office, which were executed on grounds different from those called for in his applications. The due diligence of persons who take up lands in this mode, forms an essential feature in constituting their rights. Hence, where negligence occurs, a subsequent order of survey, industriously followed up, may defeat the operation of a former one, which in the due course of business, might be supposed to describe the lands with convenient precision and certainty. It lies in the power of no individuals to lock up the land office against the settlement of the country, or other applicants, by their willful neglect and delay.

It has long been the settled usage and practice, both before and since the revolution, for deputy surveyors and their assistants to remove lost locations to other lands, where there were no existing prior opposing rights. No injury was done thereby, either to the lords of the soil, or to individuals. The pretensions of the party were thereby ascertained, and the contract was complete on his part, but subject to be annulled on the return of survey. But it has always been deemed essential in cases of this nature, that the returns of such shifted surveys

should be made in a reasonable time, in order to prevent others from bestowing their labor and money, in a fruitless pursuit of the same land. Without such constructive or actual notice, what footsteps remain in the proper offices to guide the inquiries of subsequent applicants? The term, of the prior applications afford no light whatever. Here it is obvious, that Levers by his default, has led Towers into the mistake of paying 102*l.* on the 1st December 1774, on his warrants, and Roberts of paying 45*l.* 15*s.* on the 18th August following. As to the latter, the *caveat* of 30th March 1775, did not respect him. Levers therefore ought not to be permitted to effect an injury to his adversary by his own laches, his own title shall be affected thereby. A mere survey on a lost location, removed from the lands for which it was originally designed, has no more efficacy and consideration than a pocketed application, which it is universally admitted can give no title. Such have been the uniform decisions of the courts of justice, founded on the fair principles of plain sense and common honesty, and highly conducive to security of landed titles. The establishment of the rule tends to certainty, and the prevention of lawsuits, and we are bound to follow it. Pursuant thereto, the plaintiff is entitled to recover the lands described with sufficient accuracy in his six warrants.

The limitation act of the 26th March 1785, cannot bar the plaintiff's recovery; (2 Dall. St. Laws 282, § 5) because, though he has no surveys under his warrants, yet Towers applied early in 1775, to the proper officer to execute them, and by a *caveat* entered by the defendant shortly afterwards on the 30th March following, he was prevented from having such surveys made, until the board of Property decided on his title. Immediately after such decision the present suit was instituted.

Neither can the sentiments of the Board of Property, under the act of 5th April 1782, change the nature of the title. *Ib.* 22, § 3. The same may be questioned at law "in as full and ample manner as if no determination had ever been given."

As to the survey said to have been made by John Seely for his own use in 1772, there is abundant ground to believe that it was not then made, and that it was improperly foisted in the office. He knew that he had made the survey for Levers, and at his expense; and as he could gain no title by his villiany and breach of trust, so neither could he communicate any to Towers, by his conveyance of the 19th May 1775, and therefore as to this tract the plaintiff ought not to recover.

The jury found a verdict conformable to the charge of the court.

SEPTEMBER TERM, 1800.

CORAM—SHEPPEN, CHIEF JUSTICE, YEATES AND SMITH, JUSTICES.

GEORGE M'CALMONT who survived JOHN BOYS *against*, THOMAS MURGATROYD.

Abandonment should be made by assured on a total loss the first opportunity after knowledge of the loss received, but pestilence or special circumstances may form just exceptions to the general rule.

SUIT on a policy of insurance, on two trunks of merchandize, laden in the brig Nancy, Henry Geddes, master, from the port of Philadelphia, to Petit Guave, whereon the defendant had subscribed 1200 dollars.

It appeared, that the goods had been fitted for a French market, and that the prime cost thereof was 1409 dollars 45 cents. The vessel sailed from Philadelphia on the 29th June 1797, met with a gale of wind on her passage on the 3d July, and on the 30th of the same month was captured by an armed boat, from the British ship Kingston, commanded by Lewis Parkinson, and sent into Port au Prince, then in the possession of the British forces, where captain Geddes arrived on the 5th August, and was compelled by general White, the commanding officer there, to sell his cargo against his will, and the plaintiffs' merchandize thereupon produced 886 $\frac{81}{100}$ dollars. With these net proceeds the captain purchased 5000lbs. coffee, and arrived at Wilmington, on Delaware, on the 12th October, where he made a second protest, having made a former protest at Port au Prince on the 5th August.

The plaintiffs removed into the Delaware state on the raging of the yellow fever in Philadelphia in 1797, but the insurance office of Wharton and Lewis, where the policy had been effected, was kept open at Frankford, seven miles distant from the city, during the prevalence of the contagion. The defendant also withdrew himself from the city, to avoid the contagion. On the 6th November, the progress of the disorder having abated, Captain Geddes made a third protest in the city, and on the next day the plaintiffs abandoned the coffee to the defendant, who refused to receive the same. They hereupon appointed three arbitrators, who were of opinion, that the plaintiffs could not claim as for a total loss, and the coffee was at length sold for 1131 $\frac{27}{100}$ dollars.

The plaintiffs declared as for a total loss.

Mr. Rawle for the defendant insisted, that in order to entitle the

plaintiff to recover a total loss, he should have given early notice of the voyage defeated, and made an immediate abandonment. 1 Term Rep. 613. If this has not been done, he has taken the risk on himself. Here the vessel arrived at Wilmington on the 12th October, and no abandonment was made until the 7th November following, though the office of the insurance brokers was publicly known to be kept open at Frankford. This is not such a reasonable time as the law restricts for abandonments.

A total loss is either, where the whole of the property has perished, or where the property exists, but the voyage is lost. 1 Term Rep. 615. A partial loss is where damage is done to the property, without any fault of the master, by storm, capture, stranding, or shipwreck, though the whole or the greater part thereof may arrive in port. Park. 114. The present cannot be considered a partial loss. No damage has been done to the cargo by the capture. The plaintiffs' goods remained uninjured, though they have missed a French market. Whether the goods arrived at a good or bad market is of no moment. *Ib.* 118. The plaintiffs might have abandoned, but not having made their election within the period restricted by law, they shall not now profit by the experience of subsequent events.

Mr. M. Levy for the plaintiff, answered, that it was well ascertained, whether a vessel be embargoed, or captured as a neutral, or her voyage to the destined port had been defeated, the insured might claim a compensation for his loss. Where the voyage is lost, but the property is saved, the owner has an option to abandon. 1 Term Rep. 613, 615.

It is essential that the goods should arrive at the destined port. The merchandize was insured to Petit Guave, and a loss has happened by one of the risks guarded against in the policy, and in contemplation whereof the underwriter has received his premium. In the case of *Fuller v. McCall* the proceeds of the sales came into the hands of Captain Southern, and the point of an early abandonment became of moment in the cause. But where the proceeds are in safe hands, it is of little consequence in most instances, whether the assured claim for a total or partial loss.

Many maritime countries have fixed the times within which abandonments must be made, according to the places where the losses happen, but no general commercial regulation has ascertained the periods. Park. 192, 193. The remark of Ashurst, J. in 1 Term Rep. 613, that the assured are bound to decide and signify their election to the underwriters, whether they

abandon or not the first opportunity, must be considered in reference to cases in general ; for it is sufficient if it be made in reasonable time under all the circumstances of each particular case. Park. 92. It could not be expected, that the owners should go into a city infected with the plague, in quest of the underwriters, to give them notice.

The plaintiffs and defendant sought places of refuge out of Philadelphia, afflicted by a contagious disorder, and though it might be known in the environs of the city, that the insurance office of Wharton and Lewis was kept open at Frankford, it does not follow, that this fact was known in the neighbouring state of Delaware.

Admit however, for argument sake, that the abandonment came too late, may not the plaintiff claim as for a partial loss ? He has been injured by a capture, and his goods carried by an armed force to a port for which they were not suited or intended.

The court gave it in charge to the jury, that they were of opinion, the present case was a total loss. The general rule is correct, that an abandonment should be made the first opportunity after knowledge of the loss, but pestilence, or special circumstances may form just exceptions thereto, and will deservedly have weight with a court and jury. The ground of the rule is, that the assured shall not be permitted to take advantage of events, subsequent to their receiving notice of the loss, and that the assurers may have it in their power to make the best of the property insured and saved, and be determined by their own judgments. Here the plaintiffs could not profit by the delay, nor injure the defendant. The voyage insured had been broken up, by the force of an armed boat. The proceeds of the plaintiff's merchandize had been invested in coffee, which had safely arrived in a neighbouring port, and remained unsold. A pestilence raged in the city where the policy was effected, and had compelled the insured, insurer, and brokers, to fly from their respective places of abode, and to consult their safety in uninfected houses. The plaintiffs, whatever determination they might have formed, could not securely seek for the defendant in the city, and might not have known, that Wharton and Lewis kept open their insurance office at Frankford.

The jury found conformably to the direction of the court, and the counsel agreed to liquidate the sum due to the plaintiff.

JAMES MOYES and THOMAS TETEM *against* ROCQUE BRUMAUX.

Where a partnership is sworn to by a clerk one of the partners, the books may be given in evidence to fortify or discredit his testimony.

INDEBITATUS *assumpsit* for sales of sundry ship chandlery furnished to two brigs. The only contest was, whether the defendant was the partner of John Swanwick, (who had not been served with the summons in the cause, and was since dead,) when the different articles were delivered.

To prove this partnership, the plaintiffs examined one John Lassal an out of doors clerk of Swanwick, but who had not made the entries in the books. Whereupon the defendant's counsel called for the books of Swanwick, agreeably to previous notice given, in order to invalidate his testimony.

This was objected to by the plaintiffs, who contended, that no entries made by Swanwick or his order, should be received in evidence, to defeat their demand against the partnership.

The court ruled, that the books might be shown to the jury, either to fortify or discredit the testimony of the witness, but for no other purpose.

Mr. M. Levy, for the plaintiffs.

Messrs. Ingersoll and Rawle, for the defendant.

Verdict *pro quer.* for \$442 37 cts. damages.

**ROBERT PINE and SYLVANUS PINE *against* JAMES VANUXEM.
Same *against* HENRY PRATT and ABRAHAM KINTZING.**

Misrepresentation to effect a policy of insurance, is not to be presumed.
What concealment of circumstances will vitiate a policy.

SUITS on a policy of insurance, on goods in the sloop Sally, William Seabury master, beginning at and immediately from her loading, from Philadelphia to New York. Vanuxem subscribed 600 dollars, and Pratt and Kintzing 769 dollars on the 11th August 1797, at a premium of 1½ per cent. There was a clause in the policy that Indian corn should be free from average.

The two causes were tried together by the same jury.

The plaintiffs shipped on the 29th July 1797, at Alexandria in Vir-

ginia, 1800 bushels of Indian corn in bulk, in the sloop for New York, amounting as per invoice to 1389 dollars and 32 cents.

It appeared by the protest and deposition of Captain Seabury, who was a part owner of the vessel, that he sailed from Alexandria for New York, but having met with bad weather, he put into the port of Philadelphia for a market. There the hatches were opened, and a sample of the corn was taken out and found to be in good order. From thence he sailed for New York on the 18th August, the vessel and cargo being well conditioned, and no part of the cargo having been shifted or altered since the insurance. In her passage, the sloop started her planks, filled with water off Sandy Hook, and sunk between Shrewsbury and Barnegate.

The broker proved, that the policy was effected at the lowest premium, and in the order to make insurance, the sloop Sally was called a good vessel, to sail from Philadelphia to New York. Had he been informed, that the corn was loaded in Alexandria, he would have inserted it, either in the body, or margin of the policy. The circumstances of the Indian corn being shipped at Alexandria, or of the sloop's having met with bad weather in her passage to Philadelphia, were not communicated either to the broker or underwriters.

The defendants resisted the claim of the plaintiffs, on the grounds of misrepresentation and undue concealment of material facts. The sloop was called a good vessel, though she had encountered stormy weather in her voyage from Alexandria. Whether she needed repairs or not does not appear. The captain's protest omits the material circumstance of the bad tempestuous weather he experienced after leaving Virginia, and differs in some particulars from his deposition.

Indian corn is a commodity highly perishable; it will swell in the hold of a vessel generally tight, and particularly in a hot and wet season. It is probable, the loss of the sloop arose from the moist heated state of the corn. It was not consistent with good faith, to keep the previous voyage from the knowledge of the underwriters, with all its attendant circumstances. They received the lowest premium, but if they had been made acquainted with all the facts, they would either have demanded a higher rate of insurance, or have refused to subscribe the policy. The law is not so unreasonable as to require positive proof of fraud in such cases, as lie wholly within the knowledge of the adverse party. It may be inferred from circumstances. Parke 242-3. Concealment of material facts will vitiate a policy and all other contracts, on the principles of natural law. *Ib.* 199, 203. 3 Burr. 1909. 1 Espin. 69. 2 Stra. 1183. Unless a full disclosure is made of all the circumstances of the intended voyage, even with re-

spect to the track the ship intends to take, the assured cannot recover. 7 Term Rep. 162. Even if a broker does not mention a material fact to an underwriter the latter is discharged from liability. Park. 234 But here the voyage contemplated by the policy was never in fact begun. The words as to the port of loading are highly important ; and it has been adjudged that a concealment of the true port of loading will vacate a policy. 1 Bla. Rep. 463. Hodgson v. Richardson.

It was answered by the plaintiffs, that there was no evidence whatever of fraud, misrepresentation, or improper conduct on their part. There is no proof that the sloop was damaged in her voyage to Philadelphia, or required repairs there. It is true, the deposition of the captain and his cross examination is more minute than his protests ; the latter including the events which happened from the last port of departure, and no more, according to the usual custom. If conduct of a criminal nature is imputed to the assured, it is incumbent on the assurers to make it out by proof. Park. 242.

It is perfectly immaterial where the corn was received on board. The sloop and cargo were in good order and condition when she sailed from Philadelphia. The corn was inspected and found to be well preserved ; it was not shifted or altered, after the subscription of the policy. As to the corn swelling in bulk, and thereby forcibly starting the planks of the vessel, it is mere conjecture, unsupported by evidence. The plaintiffs could have no inducement to conceal the loading of the corn at Alexandria, because by the express terms of the policy the defendants were not liable to an average loss on the Indian corn ; and the most trivial event which had ever happened to the Sally, might with equal propriety have been insisted on being communicated to the underwriters, as the passage of her from Alexandria to Philadelphia.

The case of Hodgson v. Richardson, much relied on so differs greatly from the present. There the goods were perishable articles, and put on board at Leghorn on the 10th August ; the insurance was at and from Genoa, liable to average, and the vessel did not sail from Genoa till the 5th January following, and the insurance was made on the 20th January, without any communication of these particulars to the assurers, though well known to the assured. The cargo being damaged by a storm, the assured recovered as for a partial loss, but the court granted a new trial for the concealment ; inasmuch as the goods were liable to take damage, by having lain so long on board as five months, and the policy being originally bad, the assured were not entitled to recover, though the loss happened by a storm.

The distinction between the two cases needs no further comment.

Shippen, C. J. gave it in charge to the jury, that the law will not presume that any one has been guilty of fraud, nor set aside a contract on that ground, unless it be fully and satisfactorily proved. The burthen of the proof lies on the person who would avail himself of the fraudulent conduct imputed; (Park. 242) but, from the nature of the thing, circumstantial evidence is all that can be reasonably expected in cases of this nature. It belongs to the jury to say, whether their minds are satisfied, that there has been any misrepresentation in the present instance.

Insurances are contracts of indemnity; they should be entered into and fulfilled with the purest good faith. The special facts upon which the contingent chance is to be computed, lie most commonly in the knowledge of the insured only. 3 Burr. 1909. 1 Bl. Rep. 593. The underwriter trusts to his representation, and proceeds upon confidence, that he does not keep back any circumstance in his knowledge. Though the suppression should happen through mistake without any fraudulent intention, yet still the underwriter is deceived and the policy is void. If one is kept ignorant of any material circumstance, he may safely say it is not his contract. 1 Bl. Rep. 465. Whether the fact concealed was material to the risk run, is matter of fact. If material, the consequence is matter of law, that the policy is bad. These are principles of universal law, and fully recognized in the English books.

It is of considerable weight in the present case, that the defendants were not liable by the words of the policy for an average loss on the Indian corn, and it has been very properly distinguished from *Hodgson v. Richardson*, cited by the defendants counsel, where the port of loading was unquestionably important.

It is not of moment, whether the swelling of the corn might have occasioned the sinking of the vessel, or whether the loss arose from any other cause. But the point worthy of consideration is, whether the risk run was really different from the risk understood and intended to be run, at the time of the agreement. 3 Burr. 1909. If a full communication of the corn's being laden at Alexandria, and the sloop's having met with bad weather in her passage to this port, would have varied the risk of the underwriters, and induced them to demand a higher premium than $1\frac{1}{2}$ per cent., or utterly to refuse their subscription, then the defendants were deceived and are entitled to a verdict; but if the fact is found to be otherwise, then the concealment is of an immaterial circumstance, and the policy is not vacated thereby.

Verdict against Vanuxem for 687 $\frac{28}{100}$ dollars, and against Pratt and Kintzing for 880 $\frac{8}{100}$.

Mr. Rawle, *pro quer.* Messrs. Ingersoll and Dallas, *pro def.*

Lessee of JOHN SWORD *against* PATIENCE ADAMS.

Devise to M. her heirs and assigns, and M. dies in testatrix's life-time, leaving an infant son, the devise is lapsed and void, though testatrix was assured that the son would take, by one interested in the estate. Parol evidence of the intentions of testatrix in such case, not admissible.

EJECTMENT for a house and lot of ground in the city of Philadelphia.

It was admitted, that Penelope Haley died seized of the premises in question in 1793, leaving issue three daughters: 1st, Margaret, who intermarried with ——— Currie, and had issue by him one son named William, and afterwards intermarried with George Craige, by whom she had another son named Archibald. 2d, Mary, who intermarried with ——— Thompson, and had issue by him a daughter named Mary, who intermarried with ——— Sproat, and by him had issue a son named James, now of tender years. 3d, Penelope, who intermarried with Wiliam Sword, by whom she had issue John, the lessor of the plaintiff; and Anne, who intermarried with Dr. Nathaniel Dorsey. Margaret Craige the daughter, and Mary Sproat the grand-daughter, died in October 1793, shortly before the said Penelope Haley.

The lessor of the plaintiff claimed two thirds of one third of the premises, equal to two ninth parts thereof, on the ground of his grand-mother's dying seized thereof intestate.

The said Penelope Haley made a will, dated 10th February 1792, whereby she devised to her daughter Margaret Craige, a house and lot in Pewterplatter alley, during her life, and after her death to her grand-son Wiliam Currie, his heirs and assigns; but if he should not return from beyond seas, nor be living at his mother's death, then, to her grand-daughter Mary Thompson, her heirs and assigns. She then devised as follows; to her said grand-daughter Mary Thompson, her heirs and assigns, a house and lot on Cherry street, (being the premises in question;) to her daughter Penelope Sword 450l. in public securities; to her grand-daughter Aun Dorsey 100l.; to her grand-son John Sword 100l.; to her grand-son William Currie 100l.; but if he shall be dead at the time of her decease, then to her grand-son Archibald Craiger; to her said grand-daughter Mary Thompson, her household goods and kitchen furniture; to her step-sister Margaret

Petticrew 12*l.* yearly, during her life ; to Robert Green and Jacob Green 10*l.* each ; to her executors Ashbel Green and Robert Ralston 10*l.*, for the poor widows of the second Presbyterian church in Philadelphia, and 5*l.* for building a wall round the burial ground of the said church ; to her said grand-daughter Mary Thompson, all the rest of Hugh Ferguson's bond, for the use of a negro slave named Amy ; and to her two daughters, Margaret Craige and Penelope Sword aforesaid, and her said grand-daughter Mary Thompson, and their heirs and assigns, all the rest of her estate, real and personal, equally to be divided between them as tenants in common.

On the 17th October 1793, the said Penelope Haley made and annexed a codicil to her will, reciting the death of her daughter, the said Margaret Craige, and thereby devised to her said grand-daughter Ann Dorsey, her heirs and assigns, the said house and lot in Pewterplatter alley, revoking such parts of her will as were contrary thereto, and confirming the residue.

Mr. Ingersoll for the defendant, opened his case as follows. The descendents of the testatrix were swept off in quick succession, by the ravages of the yellow fever in 1793. She herself fell a victim to it. She first heard of the death of her daughter Margaret Craige, made her codicil, providing for that event. When the afflicting news of the death of her grand-daughter Mary Thompson, reached her she was desirous of providing for that event also, and to make a second codicil, but was prevented by Dr. Nathaniel Dorsey, who was married to the sister of the lessor of the plaintiff, and of course in case his wife's grand-mother died intestate, as to any part of her estate, became entitled to one undivided ninth part thereof, in right of his wife. He informed her, (though without any ill design,) that as she had devised to her said grand-daughter Mary Thomson, her heirs and assigns, that her son James must necessarily inherit the same, and that he completely answered the description of her heir. With these assurances her mind was quieted, and she prepared for death, without making any further alteration in her will.

In addition to this parol testimony, the nuncupative will of Penelope Haley, proved on the 21st August 1794, by two witnesses, establishes her intention beyond all question. Elizabeth Kerr has deposed, that she heard the testatrix, a few days before her decease, repeatedly declare, that "she intended to give her house in Pewterplatter alley to Mr. Dorsey, and the house she lived in, to the child of her grand-daughter Sproat, in case, her said grand-daughter died;" and Olive Sproat proves the same

expressions in substance, and that she further said, that "the house she lived in, and what was in it, and a great deal more, was secured to her grand-daughter Mary and her child." Both witnesses were requested to bear testimony of what she had said.

Mr. E. Tilghman for the plaintiff opposed the parol testimony. It is well known that to pass lands by wills, the same must be in writing, and a nuncupative will cannot have that effect. The operation of the will must rest on the instrument itself, and the intention of the testatrix can only be collected from the words contained in it.

Nothing can be better established, than that if there be a devise to A and his heirs, and A dies in the life-time of the devisor, the devise is void. 4 Term Rep. 603. And in the case of *Turner's et al. lessee v. Kett*, *Ib.* 601, where A devised to B, and the heirs of her body, and for default of such issue, then over; B died in the life-time of A, and then A, by a codicil, confirmed his will; it was adjudged, that the heir of B took nothing, though it appeared that A knew of the death of B, and of the birth of her son, before he made the codicil.

By the court. We cannot receive the parol evidence which has been offered, consistently with our duty, whatever may be our own personal feeling as men. The case is perfectly clear at law, however hard it may bear on the infant, James Sproat. Private inconvenience must give way to the safety and security which must be the result of general principles, long settled and sanctified. We have no hesitation in saying that the plaintiff is entitled to a verdict. A case presented itself to us during the last vacation, which afforded us the occasion of considering this subject fully. Having discharged our office as judges, we cannot, as men, avoid strongly recommending to the lessor of the plaintiff, to carry the real intentions of his grand-mother into full execution.

The jurors subscribed a strong recommendation to Captain John Sword, to the same effect, at the bar, and immediately gave a verdict for the plaintiff.

UNITED STATES of AMERICA *against* JOHN BISHOP.

Bail in another state, suffering the principal, a military man, to come into this state, cannot take him out of the state after being tried by a court martial for a misdemeanor, until the sentence be executed.

CAPTAIN Bishop, bearing a commission in the army of the United States, was put under an arrest, and tried by a court martial, for a misdemeanor in defrauding the soldiers of their rations. Immediately after the proceedings were closed, and before the same were transmitted to the President of the United States, for his determination thereon, Conrad Cremor, the special bail of Bishop, in sundry suits in Frederick county in Virginia, offered to arrest him under the bail pieces.

Mr. Ingersoll, attorney for the district of Pennsylvania, now moved the court for a *habeas corpus* to bring up the body of Bishop, for their decision on the propriety of the bail's taking him out of the hands of the military; which was awarded. But Mr. John Ewing, the counsel of Cremor being present in court, readily agreed, that the court should take order herein, without the formality of issuing the *habeas corpus*.

Mr. Ingersoll urged, that the laws of the United States had prescribed trials by court martial for military offences. The laws of the United States, made in pursuance of the constitution, are declared to be the supreme law of the land, and the judges in every state are bound thereby. Const. of U. S. art. 6. It would be highly incongruous and lead to the greatest abuses, if the sentence of a court martial could be eluded or defeated in cases of this nature, by a bail who has suffered his principal to leave the state, where he become his security. This case is much stronger than that of Henry Banks, determined at the sittings here in February 1798. He had been taken on two writs of *capias*; and his bail in the District Court of Virginia also took him in this city. The court held, that bail in another state suffering a principal to come into this state, where he was arrested, shall not be allowed to take him out of the custody of the sheriff's officers, and remanded Banks to gaol.

By the court. Captain Bishop must be remanded to the military tribunal, until the sentence of the court martial be executed, according to the discretion of the president. After this, he should be delivered over to the bail. A contrary decision would be attended with the greatest inconveniences.

Whereupon lieutenant Robins Chamberlayne, undertook in open court, that the commanding officer at fort Jay should surrender Bishop to his bail, after the sentence of the court martial should be complied with.

JANE SHARP *against* WILLIAM PETTIT.

[S. C. 4 Dall. 215.]

No damages or costs in dower, where the husband does not die seized.

The demandant recovered dower in 250 acres of land in Sadbury township, which her husband Joseph Sharp was seized of in fee tail during the marriage, and sold to Thomas Allen, who conveyed to the tenant. A common recovery was afterwards suffered to the use of Pettit, without making the demandant a party, or her executing the deed to lead the uses, or any separate examination of the feme.

A writ of seisin and inquiry of damages issued, tested 13th September 1794, on which Joseph M'Clellan, Esq. sheriff of Chester county returned an inquisition, taken 10th December 1794, whereby it appeared that Joseph Sharp the baron was seized in fee tail of the premises, but died in July 1790, not seized thereof, that the clear yearly value of the premises was 24*l.*, that 9 months had elapsed from the death of the said Joseph until the day of issuing of the original writ, and 3 years 7 months and 10 days had elapsed from the issuing of the said writ until the taking of the inquisition, amounting in the whole to 4 years, 4 months and 10 days. And the jury further assess damages by reason of the detention of the dower, beyond the yearly value aforesaid to 1*l.* 14*s.* 3*d.*, besides costs. And the said sheriff further returned, that he caused to be delivered to the demandant full seisin of one-third part of, &c. with the appurtenances.

Mr. T. Ross for the tenant, now moved, that judgment might be entered for the demandant on the writ of seisin, but without damages or costs. If the jury find that the husband died seized, they must find the time when, the annual value of the land, damages on account of the detention and costs. But if they find the husband was seized, but did not die so, then they are to find no costs or damages, but only the value of the land; for damages are given by the statute of Merton, and the statute of Gloucester gives costs only were the plaintiff recovers damages. Co. Lit. 32, *b.* Yelv. 112. Bull. 116-7. 2 Bac. 148-9. Onsl. Ni. Pri. 109.

The court said, the law clearly was so settled. Let the inquisition be set aside as to damages and costs, and judgment be entered for the demandant on the writ of seisin.

HENRY SHEFFER, junior, plaintiff in error, *against* REMPUBLICAM.

On a conviction of bastardy, the uniform practice has been to make an allowance for lying-in expenses, and a gross sum for the support of the child from its birth to the time of judgment. And where the person who has borne these expenses is dead, the money may well be awarded to his representatives.

A writ of error or *certiorari* will not remove an indictment without a special *allocatur*, or the consent of the attorney general.

THE plaintiff in error was convicted on the 17th April 1800, in the Court of Quarter Sessions of Northampton county, of having begot a bastard child on the body of Mary Sterner, on the 10th April 1785.

The court thereupon rendered judgment, that the said Henry should pay a fine of 10*l.* and give security himself in 200*l.* and two good sureties in 100*l.* each, that the child shall not become any expense to the township of Lower Saucon, where it was born.

It then proceeded as follows :—“ And whereas the said Mary Sterner has deceased, since the birth of the child, and the expense accruing by reason of her lying-in, and also in the maintenance and support of the child for seven years, has been paid and borne by George Sterner, father of the said Mary, which said George is also since deceased, it is further ordered and adjudged, by the court here, that the said Henry pay to Casimer Hempt, surviving executor of the will of the said George Sterner 5*l.* for the lying-in expenses of the said Mary Sterner, and also 45*l.* for the support of the child for seven years from the 1st June 1786, until its arrival at seven years of age, pay the costs of prosecution, and stand committed until this judgment be complied with. ”

A writ of error being brought hereupon, without any special *allocatur*, or consent of the attorney general, the following special errors were assigned.

1. That it is adjudged, that the said Henry pay to Casimer Hempt, surviving executor of the will of George Sterner deceased, the sum of 5*l.* for the lying-in expenses of the said Mary Sterner, and also the further sum of 45*l.* for the support of the said child for seven years from the 1st June 1786, until its arrival at the age of seven years ; whereas the only sentence or punishment to be inflicted on the reputed father of a bastard child, upon conviction, by the laws of this commonwealth, is a fine of 10*l.* to the state, and security to the county, town or place, where such child is born, to perform such order for the maintenance of such child, as the justices of the peace in their sessions shall direct and appoint.

2. That the said judgment should have awarded a weekly sum or allowance to be paid for the maintenance of the said child, and not a gross sum.

3. That the order for the maintenance of the said child ought not to have retrospect, but should take place only from the time of conviction.

4. That if the said George Sterner or his executors have any legal claim upon the said Henry Sheffer, for money he is supposed to have expended for the maintenance of the child named in the indictment, the claim should have been sued and prosecuted in the proper action, by the said George or his executors, in which case the said Henry would have been allowed every legal defence and set-off against such demand, which is denied him by this summary mode of decision.

5. That by the said judgment, a debt is declared to be due from the said Henry Sheffer to the said George Sterner or his executor, and judgment awarded therefor, whereas a civil claim can in no case be covered or enforced under a criminal sentence, unless by law especially provided.

6. That the jury never decided on the claim now set up for the executor of the said George Sterner, nor had it in charge, and therefore the sentence of the court is given no matter not found by the jury.

7. That the debt from the said Henry Sheffer to the said George Sterner, or his executor, if it really exists, is altogether a distinct thing from the offence charged in the indictment, and therefore the defendant had no opportunity to defend himself against it, or to show that in fact the child was not maintained by the said George Sterner, or was maintained by the said Henry, during the seven years mentioned in the judgment.

8. That in no case of a suit between any two persons, or of a prosecution between the commonwealth and a citizen, can the court render a judgment in favor of a third person, not a party to the suit or prosecution.

9. That there is nothing in the record, pleadings or proceedings to show that the said Casimer Hempt is truly and lawfully the executor of the said George Sterner, nor had the said Henry Sheffer any opportunity to controvert or inquire into the fact, and he may therefore, under this judgment, pay the money to a person not authorized to receive it.

Mr. Hopkinson, for the plaintiff in error, proceeded to insist that the judgment was erroneous, because it included lying-in expenses, awarded a sum in gross, and had a retrospective view; but he was stopped by the court, who said it had been the uniform practice under the law to make an allowance for lying-in expenses, and to direct the payment of a gross sum, for such time as had elapsed from the birth of the child until the day of rendering judgment, and a future weekly allowance until it

became seven years old. Were it otherwise, the father of a bastard child flying into another state, would escape the payment of the sums necessarily expended for the maintenance of the child during its minority. And on this head, Mr. M'Kean, attorney general, cited 2 Show. 258. An order of bastardy was moved to be quashed, because the gross sum of 40s. was ordered besides the weekly payments; but the court held it well enough, and that it has been ruled often and often, that the reputed father ought to pay the extraordinary charges.

Mr. Hopkinson then confined his objections to two grounds; 1st, That it did not appear on the proceedings who maintained the child, or 2dly, that Casimer Hempt was the executor of George Sterner, except by the sentence itself; he may not be the true executor, and yet Henry Sheffer had it not in his power to controvert it.

The very right must appear to the court in the body of the record: an executor or administrator must produce his probate or administration. Hob. 233. A plaintiff executor must plead the probate of a will with a profert. Cro. Jac. 299.

The attorney general insisted, that the writ of error *improvidè emanavit: a certiorari* or writ of error must be especially allowed by the Supreme Court, or one of the justices thereof, or sued out with the consent of the attorney general, before it shall be available to remove any indictment, or proceedings thereon, by the act of 3d April 1791. 3 Dall. St. Laws, 94. But if the indictment was properly before the court, the two exceptions have no weight. If the plaintiff in error had paid any moneys for the support of the child, he had it in his power and would have shown such payments to the sessions below. They were the legal judges of the fact, at whose expense the child had been brought up, and a payment under their order would completely have indemnified Sheffer. The mother of the bastard being dead, and her father also, who appeared to the sessions to have been at the expense of her lying-in and maintaining the child, they were necessarily obliged to direct the payment of the money to the representatives of George Sterner, unless the defendant below could be legally exonerated of those sums by their eventual deaths, and it must be intended that they made the necessary examination into all facts on which their sentence was founded.

By the court. The writ of error has issued improperly, without a special *aliocatur*, or the consent of the attorney general. But admitting that the proceedings were regularly before us, could we say that the judgment was erroneous? Under the circumstances of the case, could any other judgment with propriety

have been rendered? Are we not bound to believe that the court below has correctly determined on the facts, by whom the child was supported, and if such person is dead, who are his proper representatives? The payment of the sums advanced is equally a necessary consequence of the conviction of bastardy, as the making restitution of stolen goods to the owner, on a conviction of larceny. If in the latter case, the owner died before conviction, the goods would be awarded by the court to his representatives. A common instance will suffice to show, that money may be awarded to persons not named in the indictment or proceedings. Put the case of Overseers of the Poor advancing money for lying-in expenses and support of a bastard child, and that those overseers had been removed from office before judgment had on the indictment, those moneys would be directed to be repaid to their successors.

On the whole, we see no error in the judgment, and therefore it must be affirmed.

ISAAC POLLOCK *against* JOHN HALL.

Same *against* Same.

[S. C. 4 Dall. 222.]

Discontinuances are the acts of the court and subject to their discretion. They will not be allowed, after a cause has [been referred, and the evidence heard by the referees.

THIS was a report of referees, finding for the defendant the sum of 2300 dollars, signed on the 9th May 1800.

It appeared that the referees had met several times on the business of deciding the matters in controversy, and had heard the parties allegations and proofs. They at length determined that a quantity of Irish linens was properly chargeable to the plaintiff, who being dissatisfied therewith, consulted his counsel, and by his advice, on the 21st April, discontinued his suit in the prothonotary's office and paid off the costs. He afterwards attended before the referees, until the making of their report, but with a protestation that this should not affect his discontinuances, if he was entitled thereto.

These discontinuances were made one of the grounds of exceptions to the report, on the part of the plaintiff.

Messrs. W. Tilghman and Morgan for the defendant, objected thereto, and cited Oxley and Hancock v. Olden, 1 Dal. 430. One cannot annul a reference, after the referees have investigated the whole transaction, and agreed on their report, without any imputation of misconduct. A plaintiff must move for a discontin-

ance, after joinder in demurrer. 1 Crompt. Pract. 118. There can be no discontinuance without payment of costs. *Ib.* 119. After verdict on a writ of inquiry, there can be no discontinuance, without the defendant's consent. Carth. 87. A discontinuance will not be allowed after a special verdict, in order to introduce fresh proof in contradiction to the verdict. 2 Bl. Rep. 815. It is in the discretion of the court, whether they will permit a discontinuance on a special verdict; they will refuse it in a hard action. Annal. 201. Plaintiff cannot discontinue without leave after demurrer joined and entered, or after verdict on a writ of inquiry. Sherid. Pract. 535. Style Pra. Reg. 198, 199, (old ed. 161.) There can be no discontinuance without leave, after issue joined. Gilb. C. B. 219. An avowant in replevin cannot have leave to discontinue. 1 Crompt. Pract. 119. 1 Stra. 112. Nor can there be any discontinuance after judgment for the avowant in replevin, on demurrer. 1 Crompt. Pract. 119. 1 Barnes 111. *Miller v. Hutchinson.*

All these cases prove, that discontinuances are under the power and control of the court, and considered as their acts; whereas nonsuits are the mere acts of the plaintiffs. Jury trials differ materially from references under our defalcation act of 1705. 1 Dall. St. Laws 65. In the former, there may be surprise by unexpected evidence, and the verdicts are generally unknown until they are openly delivered. It is otherwise on references in most instances. There may therefore be a degree of policy in allowing a plaintiff to take a nonsuit on a trial by jury, but none in suffering him to enter a discontinuance at his mere will, where judges of his own choosing have found against him. It puts the parties on a footing wholly unequal; the defendant is bound by the report, while the plaintiff exercises his election. But both parties are actors on a reference, and a sum of money may be found due by a plaintiff, to which he will not readily submit, if he is allowed the opinion of a discontinuance. The words of the defalcation act that "the award or report of referees made according to the submission of the parties, and approved of by the court, and entered on the record or roll, shall have the same effect, and shall be deemed and taken to be as available in law, as a verdict given by twelve men," do not prove, that as a plaintiff may in common instances refuse taking a verdict and become nonsuit, he may also after a full hearing by referees, discontinue his action. Where a defendant is an actor, as in replevin, a plaintiff by our practice cannot without special permission, strike off his suit. If the present motion prevails, it will be utterly subversive of the utility of references, and put an end to them. The legislature

never could have contemplated such a power of discontinuance, reserved to the plaintiff, on references, when they passed the defalcation act.

Messrs. Dallas and Bickley for the plaintiff. The English practice varies in many particulars from our own. There a party is not held to bail on civil process without a previous affidavit filed, and many other instances may be put to evince a difference. But cases are not wanting in England to show, that discontinuances are generally matters of course on payment of costs, being made on side bar motions. In *Hook, adm'r. v. Haywood*, 1 Barnes 112, the practice on this subject was variously reported; but in *Heber v. Bishop*. *Ib.* 111, it is said, that a plaintiff may discontinue at any time. It is indeed laid down in some books, that there can be no discontinuance after a demurrer argued; (Cro. Jac. 8, 35) nor after a general verdict, though it may be after a special verdict. 1 Salk. 178. Gilb. C. B. 122. But leave has been given to discontinue, after judgment delivered for a defendant on demurrer. 1 Lil. Ab. 644. 1 Saund. 23, 39. 1 Lev. 227, 298. After demurrer on an arbitration pleaded, it is not usual to discontinue the action, but to argue the demurrer to try the validity of the arbitration so pleaded, to avoid delay. 1 Lil. Ab. 644. In the more modern books it is said that a plaintiff may discontinue on a side bar motion, on payment of costs, either before or after declaration. Sherid. Prac. 534-5. Discontinuances are side bar rules. 6 Term. Rep. 61-6. An attachment will not lie against a plaintiff for costs on a discontinuance. 7 Term. Rep. 6.

Our own practice must however, govern on this head, being accommodated by long experience, to our local situation. A slight review of the records of this court will suffice to show, that plaintiffs have always been allowed to discontinue, either before or after issue joined, after a special verdict, and even after a reference entered into. We have never heard of an application made to the court for leave to discontinue. Less than half an hour's search has enabled us to lay before the court the following cases from their dockets.

Lloyd's lessee v. Taylor. September term 1764. Rule for trial by proviso. Discontinued.—*Elim's lessee v. Schillenberger*. September term 1765. Rule for trial. Discontinued.—*Chew v. Jones*. September term 1767. Rule for trial. Discontinued.—*Neave v. Forbes*. September term 1771. Rule for trial by proviso. Discontinued.—September term 1767. *Foulk's lessee v. Rennix*. *Sur* reference. Discontinued.—September term 1773. *Leach's lessee v. Armitage*. Special verdict found 21st April 1775, and discontinued by Mr. Read

attorney *pro quer.* next day.—December term 1797. *Pringle v. Vaughan.* Judgment for the plaintiff on 3d September 1798.—Mr. Lewis for the plaintiff, on 14th August 1800, opens the judgment and discontinues the suit.—September term 1798. *Davis v. Portious.* Referred 13th March 1799. Discontinued 13th August 1800.

We have also been furnished with another case, on which we greatly rely. It is in point, and stronger than that now before the court. James Starret brought partition of certain lands in Cumberland county against James Chambers and others. When the cause was at issue, it was referred at Nisi Prius at Carlisle on the 18th May 1768, of five persons, or any three of them, who were to report to the next September term. The referees met accordingly, heard the proofs of the parties, and made a report, finding that the plaintiff had no cause of action, which was returned into the prothonotary's office on the 21st September 1768. On the 24th of the same month the plaintiff came into the prothonotary's office before the sitting of the court, and discontinued his action. Messrs. Chew, Galloway and Dickinson, were of counsel with the defendants, but made no exceptions to this act of the plaintiff's; and it will be admitted, that their silence on this occasion, is strong evidence of their sense of the practice. Afterwards the same Startet instituted an ejectment for his proportion of the same lands, which came on to trial at Nisi Prius on the 11th June 17v4, at Carlisle, before Chew, C. J. and Moreton, J., and a verdict passed for the defendants. We are authorized to say, that on this trial, the former report and discontinuance between the parties, having been spoken of, the then Chief Justice justified the propriety of the former discontinuance; and it must be presumed, that this was the result of reflection.

Our defalcation act puts reports of referees on the precise footing of verdicts. On the plea of payment, the jury may certify a sum due to the defendant. He is equally an actor on a jury trial, as on a reference, and yet it has never been known that the plaintiff was denied the liberty of suffering a non-suit, which is substantially a discontinuance. So in replevin, in England, where both parties are acknowledged actors. the plaintiff may become non-suit. 1 Crompt. Pract. 263. And in a late replevin of *Murgatroyd v. McClure*, in the Circuit Court of the United States for the district of Pennsylvania, where the court's opinion was in favor of the defendant, they held, that though the plaintiff could not discontinue without the leave of the court, he was not obliged to take the verdict, but might become nonsuit. The reason of the laws suffering a nonsuit of the plaintiff is grounded on possible sur-

prize, and to prevent his right being concluded. Parties before referees surely are not always exempted from surprise.

Curia advisare vult.

Shippen, C. J. two days afterwards delivered the opinion of the court. The question agitated is of great magnitude, as it concerns the practice of the courts of this state. The method of settling suits by reference, has been experienced to be highly beneficial, and we should reluctantly throw any obstacles in the way, which might affect this mode of trial.

The difficulty in our minds has been created by the case of *Starre^t v. Chambers et al.* There the discontinuance passed *sub silentio* without argument. But it is confidently said, that Chew, C. J. afterwards recognized the practice on a subsequent trial, between the same parties. If it even be the fact, we are possessed of such information on the subject, as thoroughly satisfies us, the opinion was suddenly given and was not the effect of reflection. We possess every respect for his opinion, and know his present sentiments.

In many instances, discontinuances in England are mere side bar motions, but are always subject to the discretion of the court. So is the rule laid down in Annal. 201, cited at the bar. They are the acts of the court.

It cannot seriously be supposed, that it was intended by the defalcation act, that when parties had submitted their disputes to judges of their own choice, either should be at liberty to recede from their determination, after the matters in controversy had been fully examined, and the referees had made up, or were about to make up, their minds on the subject. If such a construction was established, it would be unreasonable to expect that defendants would readily agree to submit their causes to such a tribunal. This is the true spirit of the resolution in *Oxley and Hancock v. Olden*, cited from 1 Dall. 430. We cannot on the fullest consideration, think, that the solitary case of *Starret v. Chambers et al.* is binding on us as an authority; and therefore overrule the exception of the discontinuance which has been taken to this report.

The consideration of the report as to the other exceptions founded on the merits, was adjourned.

CASPER WEIST *against* FRANCIS LEE.

A defendant pays money to one of the attorneys in the cause, (who is not the attorney on record, and who afterwards absconds,) after notice to the contrary, the payment is in his own wrong.

RULE to show cause why satisfaction should not be entered in this action, on payment of 235½ dollars into the prothonotary's office.

Judgment was obtained on the 19th March 1798, for 375, dollars, and a *fi. facias* to September term following, which was returned *nulla bona*. Whereupon *testatum fi. fa.* issued to Chester county, returnable to March term 1799, on which was returned goods levied.

The defendant filed an affidavit, that on the 15th May 1798, he had paid to George Vaux, the Clerk of Joseph Thomas, formerly one of the counsel in the cause, 210 dollars in part of the plaintiffs demand, (Mr. Thomas Ross, the attorney upon record of the plaintiff's being then out of town,) and that on the 9th August following, he tendered to the plaintiff 235½ dollars, the balance of the debt and costs which he refused.

Mr. Ross on his solemn affirmation declared, that shortly after he had issued the first execution, he met the defendant and told him what he had done. The defendant said he had dealings with Joseph Thomas. He replied, his client was dissatisfied with Thomas, and he must not pay the money to Thomas, or any other person, but to himself. The defendant then answered, he would call shortly at his office and settle the debt. Thomas disappeared on the 3d August 1798.

The court said, that payments should be made to the attorney on record, but there was no necessity of determining in this case, whether payments made to other counsel in the cause, might not under particular circumstances be established. Here there was express notice given to the defendant, not to pay to Thomas, by the person regularly entitled to receive the money ; and this leaves him without an excuse for his conduct. He must abide the consequences.

Rule discharged.

Mr. T. Ross, *pro quer.*

Mr. Frazer, *pro def.*

ROBERT SHAW *against* JOHN ATKINSON, RICHARD HUNT and JOHN STOWERS.

Where a replevin is brought for goods distrained for rent and the cause is referred, and the referees find a sum due for rent beyond the time of distress, report will be set aside.

REPLEVIN for goods distrained for rent, brought to December term 1798. Afterwards "all matters in variance between the parties in this cause were referred to William Hamilton, John Dunlap and John Dorsey, or any two of them." The referees reported the sum of 1000 dollars to be due to the defendants, upon a balance of all accounts, by them settled up to the 1st July 1800.

An exception was filed by the plaintiff to this report, that the distress on which this replevin was founded, was the seizure of the property of the plaintiff on the 11th December 1798, for rent then due; and the referees in making their report, have avowedly taken into consideration, and decided both upon the rent accruing to the 1st July 1800, and the general accounts between both parties to that time, which by the terms of the submission, or the general tenor of their powers, they had no legal authority to do.

Mr. T. Ross for the defendants, offered to show, that the plaintiff exhibited to the referees by way of set-off to the rent due all the repairs which he had done to the house out of which the rent issued, including those done in 1799 and 1800, after the replevin brought, and made no objections to the referees going into the whole of the accounts. He therefore virtually agreed, that they should settle all matters between them.

Mr. M. Levy for the plaintiff. The powers of the referees can only be collected from the record, and the award must be judged of on the face of it. Neither can be supplied by parol testimony. On a mere parol submission this court cannot render judgment. However great the powers are, which this court exercise, still they are circumscribed within certain limits, and their proceedings may be reviewed in the High Court of Errors and Appeals, who can only determine from what appears on the records themselves.

Here the referees have evidently exceeded their authority. An award must be according to the submission, which only comprehends disputes then existing. Kyd on Awards, 91, 92, 113. If the time limited for making an award expire without an award made, application must be made for making the submission to a second arbitration a rule of court, otherwise the court cannot grant an attachment for non-performance of the award on the second arbitration. So if the real

parties submit to a second arbitration, without a rule of court. *Id.* 218. 2 Term Rep. 643.

By the court. We have every leaning in favor of awards which so greatly contribute to settle disputes. But here the finding of the referees clearly exceeds their authority, which was confined to rent due on the 11th December 1798, for which the distress was taken. A confirmation of the report therefore, would be error on the fact of the proceedings. Besides, the bail to the sheriff in the replevin bond might be improperly affected by such a decision. When they became sureties for the plaintiff, they would naturally regard the quantum of rent then claimed by the landlords, and determine their conduct accordingly.

Report set aside.

**PELATIAH FITCH and RUFERS LAWRENCE plaintiffs in error *against*
REMPUBLICAM.**

Indictment that B was peaceably possessed in his demesne as of fee of certain lands, and continued so seized and possessed until F. and L. thereof disseised him, and him so disseised and expelled did keep out, &c. held good on error.

WRIT of error to Luzerne county, on a conviction of forcible entry and detainer on the 21st August 1799, whereon judgment had been rendered for the commonwealth.

The indictment stated, that "Nathan Beach, esq. was lawfully and peaceably possessed in his demesne as of fee of a certain tract of land in Huntingdon township in Luzerne county, and continued so seized and possessed, until Pelatiah Fitch of, &c. and Rufers Lawrence of, &c. with other malefactors unknown, on the 26th March 1799, with strong hand and armed power into the tract of land aforesaid, with the appurtenances, in the township and county aforesaid, unlawfully did enter, and him the said Nathan Beach thereof disseised, and him the said Nathan, with force and arms and strong hand expelled, and him the said Nathan, so disseised and expelled from the said tract of land, with the appurtenances, from the said 26th day of March, until the day of the taking this inquisition, with like force and arms, and strong hand and armed power, did keep out and do yet keep out, to the great damage of," &c.

Mr. Ingersoll for the prosecutor admitted, that the word possessed, as applied to an estate of freehold was improperly used, but contended that there was sufficient matter laid in the indictment to show that Nathan Beach, who was put out of possession, was seized of a freehold, to bring him within the purview of the stat-

nte of 8 H. 6. 1 Haw. c. 64, § 38. 2 Burns, J. 204, 14th ed. It is stated, that he was possessed in his demesne as of fee, continued so seized and possessed, until the defendants disseised him, and him so disseised and expelled, did keep out, &c. Disseisin is a term of art, and refers to a freehold interest. Farresl. 123. Exception, that an indictment did not say, *ad tunc existent. liberum tenementum*, and that it is not suplied by the word *disseisivit*, disallowed. Allen 49. The expressions "demesne as of fee," "continued so seized," "and so disseised and expelled," &c., exclude every idea that it was less than an estate of freehold. Seized or possessed of a messuage or house, then being the freehold of A, proves that he was seized of such an estate, whereof he might be disseised. Cro. Jac. 633. No words of freehold in an indictment but the words *expulit* and *disseisivit*, which could not be true, if the party expelled and disseised had not a freehold; exception disallowed. 3 Leon. 102.

By the court. The indictment has not been drawn with accuracy. Though the word *disseisivit* may be taken to imply a freehold, yet it is not sufficient without showing what estate the person disseised had. 1 Vent 306. But the other words in the indictment seem sufficiently to show that Beach was seized of a freehold estate, according to the authorities cited.

Judgment affirmed.

Mr. Dick for the defendants, was not present at the argument.

HIERONIMUS WARNER et al. ex'rs. of PETER FISS against the heirs and terretenants of JABEZ EMORY.

Money received by delinquent collectors for county rates and levies under the act of 20th March 1725, or health office taxes under the act of 24th April 1794, or funding taxes of 16th March 1785, remain a lien on their lands, after they should have paid the money into the treasury. *Aliter*, of carriage taxes under the act of 20th March 1788.

Case stated for the opinion of the court, on a *scire facias* brought on a mortgage, dated 18th August 1795, for 1000 dollars; recorded two days afterwards.

It is agreed, that the mortgage in question was duly executed, and given for a valuable consideration. Jabez Emory, the mortgagor, whose heirs and terrentenants the defendants are, was duly appointed on the 4th June 1791, a collector of county rates and levies in and for the city and county of Philadelphia, to collect the said rates and levies for that year; and was also duly appointed to the same office in the years 1792, 1793, and 1794. By virtue of the said several

appointments, he the said Jabez undertook the collection of the said taxes, and on the day of the said mortgage being given, and for six months before, was indebted to the county of Philadelphia in the sum of \$1235¹²/₁₀₀, for county and hospital taxes of the said county; and was also indebted to the said county, or to the state, before the same day, for carriage taxes, under the act of 20th March 1783, in 476²⁴/₁₀₀ dollars. On the same 4th day of June, in the same year, he was appointed collector, and authorized as such, to receive the unpaid funding, county, and carriage taxes for the years 1785, 1786, 1787, 1788, and 1789, and county, carriage and cell taxes for 1790, in the county of Philadelphia, which remained due and uncollected on the books of Joseph Stiles and Daniel Drais, who in those several years had been respectively appointed to collect the said taxes in the said county; and on the day of the said mortgage being given, and long before, had been indebted to the public in the sum of 845¹¹/₁₀₀ dollars. The aggregate of the above balances due from the said Jabez Emory is 2558²²/₁₀₀ dollars, moneys by the said Jabez received and collected.

The question submitted to the opinion of the court is, whether the aggregates of the said several arrearages, or either of them, are by law a lien on the real estate of the said Jabez, from the time he became indebted for the same, so as to exclude the said mortgage, on which this suit is founded. If the court should be of opinion that they or either of them are so, then it is agreed that the proceeds of sales of the mortgaged premises shall be appropriated in the first instance to the payment of such lien.

On the argument, Mr. M. Levy for the plaintiff admitted that 1253¹²/₁₀₀ dollars, due for the county and hospital taxes, remained chargeable on the real estate of the collector, and took place of the mortgage. The words of § 23, of the law of 20th March 1724-5, as to county rates and levies, expressly create such lien. "All gifts, grants, and sales, which shall be made by any of said delinquent collectors, of any of their said estates, after the time they should have paid the money or effects arising from the said assessments, unless the estate so seized shall be sufficient to answer what they are in arrear, are hereby declared to be fraudulent, and shall not prevent or avoid the seizures and sales hereby appointed to be made thereof as aforesaid." 1 Dall. St. Laws 218. And the health office act of the 24th April 1794, § 19, puts the taxes under that law, on the footing of the taxes for county rates and levies. 3 Dall. St. Laws 572.

It was also admitted by Mr Ingersoll, of counsel, with the commissioners of the county of Philadelphia, that 476²⁴/₁₀₀ dollars, due for carriage taxes from the collector, were no lien on his lands. This act was passed 20th March 1783, and by § 6, the commissioners, assessors and collectors, were vested with the like powers, as were given by the law to raise supplies, passed on the 27th March 1782. 2 Dall. Laws 96. The 28th and 29th sections of this former act, pursued the 20th, 21st, and 22d sections of the county rates and levies act, but the vacating of grants, gifts, &c. in the 23d sect. is omitted therein. 2 Dall. Laws 13.

The controversy therefore was narrowed down to the 845⁷¹/₁₀₀ dollars, collected on the former duplicates of Stiles and Drais. On this head, it was contended on the part of the plaintiffs, that the former collectors having been originally appointed, and accepted the appointment, the liens attached on their estates only. By § 9 of the act of 1725, they are to demand of the parties the respective sum wherewith they are chargeable, and give notice of the day of appeal, which Emory could not do, the time being passed. By § 14, they are to account in six weeks, and pay the whole money in three months. By § 15, their neglects are to be certified. By § 19, they are to be fined in case of neglect. By § 20, process was to issue against their estates, which by § 21, were to be sold; and by § 23, their gifts, grants and sales, after they should have paid in their money, are declared fraudulent. But these different provisions only relate to the collectors who receive the trust originally, and not to subsequent appointments.

As to funding law of 16th March 1785, (part whereof is only inserted in 2 Dall. St. Laws 256, but the whole of it in the first edition of laws, pa. 460,) the 36th section giving the commissioners power to appoint collectors, who are to notify each person of the sum assessed on him, and of the day and place of appeal, and the 38th section directing the commissioners to transmit the duplicates to the district collectors, show that the liens apply to the first collectors only. It may be said of the legislature, in both instances, *voluit sed non dixit*.

Such liens are of a dangerous nature, which cannot, with common prudence, be discovered in the public offices. They are justly odious, when they operate hardly against persons who fairly advance their money on an honest consideration, and should be strictly construed. Indeed, by the act of 3d April 1794, 3 Dall. Laws 526, respecting decedent's estates, the commonwealth is to be last paid.

As to the interest, in either of the cases, it is contended, that

it can only be computed from the date of the mortgage, inasmuch as reasonable diligence ought to have been used by the county commissioners, to compel the payment of the collector's outstanding balances.

Mr. Ingersoll answered, Whether liens are founded on sound policy, are reasonable or not, must be submitted to the legislature; the judiciary branch only decide on them. The liens on the estates of deceased persons are by many thought highly inconvenient, but the legislature disapproved of the specification clause first introduced into the bill, and thought proper to insert the term demands in lieu thereof.

May it not, however, be asked, why the liens admitted to extend to the collectors first appointed, should not also be applicable to others coming to their stead? Though a collector dies, or is removed from his office for misconduct, still the public interests require that the assessments should be collected. But it does not appear from the case as stated, that Stiles and Drais have received any moneys which remain unpaid, and that consequent liens have attached on their estates, or that they are living or dead. Their successors clearly are either within all the provisions of the laws, or under no part thereof.

It is to be inquired, whether the plaintiff's construction is warranted by the expressions of the legislature. By the 9th section of the law of March 1725, collectors to be appointed from time to time, and all the different clauses relied on by the plaintiff's counsel make use of the words said collectors, which comprehend all who have been, or shall be nominated to discharge that trust. Suppose under the 16th section, that Stiles and Drais had made no demand of the taxes, could not Emory make one? Or if under the 17th section, they had made do distress for non-payment, would not Emory be competent to make one? And would not Emory and his estate, in such instances, be equally obnoxious to the several provisions in § 20, 21, 22 and 23 of the act? Again suppose a sheriff removed from office by death or otherwise will not the law, which created duties, obligations and penalties on him, descend on his successor.

The words of the funding act still appear stronger than the law for raising county rates and levies. The 36th section empowers the commissioners, annually or oftener, if necessary, to appoint collectors; and in the close of 44th section, it is declared, that "all the estate real and personal of such delinquent collector, is and shall be taken and deemed to be bound, as a security for the payment of such sum, at and from the expiration of ninety days, as fully to all in-

tents and purposes as if judgment had then been entered against him for the said debt, in a court of record." Both acts clearly contemplate a summary remedy to be given against delinquent collectors, either those originally appointed or their successors.

There is little room for controversy, as to the period of commencement of interest. Where one has received money belonging to another, and has retained it without the consent of the owner, it is to be considered in the same light as money lent, and ought to carry interest. 1 Dall. 349.

By the court. The lien respecting the carriage tax has been properly given up. On a full examination of the laws, we see no reason for a distinction between the other two items of the accounts against the collector, and are of opinion, that the 1235 dollars $\frac{58}{100}$ for the county and hospital taxes, and the 845 dollars $\frac{71}{100}$ uncollected by Stiles and Drais, and afterwards received by Emory, remain charged on his real estate, in preference to the mortgage in question, together with interest from the respective times, when by law he should have paid the same into the treasury.

The Commissioners of the district of Southwark *against* WILLIAM
NEIL.

In proceedings on a by-law, it must appear that special authority of the corporation was strictly pursued.

ON a *certiorari* to Ebenezer Ferguson, esq. a justice of the peace of the county of Philadelphia, he returned, that he had fined the defendant 15s. for selling three-fourths of a cord of wood, contrary to the ordinance of the district of Southwark, together with 2s. 6d. costs.

The ordinance was passed on the 10th June 1800, to restrict the cording of all wood to the public corder. It directs, that all cord-wood, which shall be brought to and exposed for sale, at any of the landings or wharfs on the river Delaware within the district of Southwark, shall be corded and measured by the corder or corders appointed by the commissioners and no others. And if any person or persons shall sell on any of the wharfs or landings within the said district any cord-wood, unless the same shall have been corded or measured by the proper corder appointed as aforesaid, every person so offending and being duly convicted before any competent tribunal, shall forfeit fifteen shillings and the costs."

The district of Southwark was incorporated by an act of assembly passed on the 18th April 1794, the 12th section whereof directs, that "the commissioners shall have power to make

such laws, ordinances, &c., as shall be necessary and convenient for the purpose of ascertaining the toll and rates of wharfage of all articles brought to public landings in the said district ; for directing the conduct of all persons concerned in buying, selling or acting on any part of the estate belonging to the said district, &c. 3 Dall. Laws 499.

By the court. The bye-laws of the corporation, so far as it respects private wharves, is invalid. Their powers in this particular are limited by the act of incorporation to public landings and their public estate. Their special authority, affecting the property of individuals, must appear on the face of the proceedings to be strictly pursued. Cowp. 29.

Judgment reversed.

Mr. Dallas. *pro quer.* Mr. Rawle, *pro def.*

ANDREW KENNEDY *against* RICHARD BAILLIE.

An unmarried man, who took lodgings in the city, rented a store and traded there, declaring his intentions of taking up a permanent residence, and residing there six months who afterwards absconded, was declared an inhabitant under the domestic attachment law.

A FOREIGN attachment issued in this court, returnable to the last March term ; and afterwards a second foreign attachment at the suit of Potter, Page and Price in co. A domestic attachment afterwards issued to the same term, at the suit of George Dobson, founded on the solemn affirmation of Thomas Biddle. He declared that he was well acquainted with the defendant, Baillie, during his residence in Philadelphia ; that he came there about the month of November 1799, as an unmarried man, took lodgings, and rented a store in the city, where he carried on trade ; and that the said Baillie frequently declared to him his intention of taking up a permanent residence in the city, but had since absconded, &c.

On these facts, which were not disputed, Mr. John Ewing of counsel with Dobson, moved the court to quash the foreign attachments, and cited Lazarus Barnet's case. 1 Dall. 152.

Mr. Sergeant for the plaintiff, insisted that the defendant could not be deemed an inhabitant, within the attachment law, not having resided twelve months within the state, agreeably to the opinion delivered in Taylor and Finlayson v. Knox et al. 1 Dall 159.

Shippen C. J. In the cases cited by the plaintiff's counsel, the court cautiously avoided laying down any general rule, as to what will, or will not make a person an inhabitant, within the attachment law. They merely glanced at an idea, which appeared reasonable under the then existing laws and constitution ; though they also say, the want of one year's residence in such cases will, always

have considerable weight with them. A circumstance existed in the instance of David Knox, which differs it greatly from the present. He had another partner in England of the name of Cowan, who resided there, kept store and traded. His supposed misconduct, as was sworn, led Knox to sail for England. It appears to us under the whole circumstances disclosed, that the present case is a more proper object of the domestic attachment law, and that the effects of Baillie should be divided ratably, amongst all his creditors; and therefore dissolve the foreign attachments which have been issued.

JOHN FIELD and SON *against* JOHN COLERICK.

Special bail required where a former suit has been brought for the same cause of action, and no bail given.

MR. S. LEVY moved to discharge the defendant on common bail, there having been an amicable action entered by the plaintiffs against the defendant some time ago, for the same cause of action, in Washington county.

Mr. Hollowel for the plaintiffs, urged that no bail was given in the amicable suit.

Per cur. The bail is the vexation. And if bail had been given in the former suit, it would be a good ground of discharge on common bail now. The reason why there is no bail to debt on a judgment, is because there is bail in the original action. 2 Barnes. 93. 1 Bl. Rep. 507. Sayer 43. 2 Stra. 1039. 2 Wils. 29. Comy. 556. 2 H. Bla. 278.

Motion refused.

ROSANNA M'KARRACHER *against* DANIEL M'KARRACHER.

On a sentence of divorce, the wife's disclaimer of alimony is not a perpetual bar to future applications.

Where there has been a reconciliation between the parties after a divorce, a new divorce is necessary to found the wife's claim of alimony.

THE libellant obtained a divorce from bed and board from the respondent her husband, on the 15th September 1792. A *curia advisare vult* was then entered as to alimony.

Afterwards on the 15th June 1793, she waived her claim to alimony in open court.

On the first day of the present term, she filed her petition for alimony, stating therein, that her husband had represented to her, that he was possessed of no property; but that she is well informed, he was now possessed of property to a considerable amount.

Mr. M. Levy for the respondent, objected to the courts go-

ing into the inquiry The wife has waived her right by matter of record, and is now completely barred. If a woman refuses to accept a jointure, she shall not be at liberty to make a second election. The law directs, that the court shall exercise their discretion in allowing alimony "as the justice of the case shall require." 2 Dall. Laws, 387, § 10. But alimony ought not to be forced on a woman after she has disclaimed it by her free and deliberate act. The waiver of an use is a complete disclaimer. 3 Co. 27, *b*. Waiver is a perpetual dereliction. Co. Lit. 348, *b*. Waiver in the case of a felony, is a full abandonment. 5 Co. 109.

Mr. Ingersoll *e contra*. Where there is a conveyance of a matter of a permanent nature, an election once exercised shall conclude the party. But the right now insisted on is occasional, and depends on a variety of circumstances.

If the husband was disabled by accident or disease from maintaining himself and family, and the court on a hearing should disallow the claim of the wife to alimony, this would be a stronger case than the present. And yet it will not be pretended, that if the husband should be restored to his health, or receive an accession to his property, a future claim of alimony would not be received and granted. The waiver here of the wife was founded on a supposition, that her husband was overwhelmed with debts and unable to make her any allowance, but that foundation no longer exists. Her act in 1793, was a nonsuit for the time, but no perpetual bar.

By the court. The declaration of the wife in open court sometime after her obtaining a divorce, must be considered as having reference to the then subject matter. It abandons her claim on her first petition, but on proper grounds she may resume it at a future period, on a new petition.

Several witnesses were examined on both sides, and the facts appeared as follows:

The libellant was the second wife of the respondent, and had two children by him, one of whom was lately dead, and the other was about the age of 16 years. He formerly carried on the blacksmith trade, but having twice broken his leg, he purchased a lot of ground in the city, and built a good three-story house thereon, though a considerable part of his tradesmen's bills remained unpaid. He now keeps a well accustomed tavern.

After the divorce, the wife received her clothing, a bed and bedding, and sundry articles of household furniture from her husband. And her step-daughter swore, that the libellant broke open a chest,

and took away money and valuable papers, and by means of a false key, opened her husband's desk, and took out money at different times, both before and after the divorce. She also gave testimony that shortly after her step-mother's divorce, the libellant came to her father's house, and lived with him two or three days, but the witness could neither tell the time of the divorce, nor when this reconciliation happened. It also appeared highly probable from other circumstances, that she was incorrect in point of time. After the separation the respondent continued his tavern, with the assistance of a woman named Hamel, with whom he had formerly an illicit connection. The libellant rented a house in a remote part of the city, kept lodgers, was engaged occasionally as a nurse, and maintained her two children.

It was insisted for the respondent, that there had been a reconciliation between the parties after the divorce, and that the husband's freely cohabiting with his wife, though after an act of adultery, entitled her to dower. Co. Lit. 32, *a*, *b*. A single instance of reconciliation is sufficient, after the sentence of divorce pronounced to preclude the wife from a separate maintenance under the former decree. No line can possibly be drawn to ascertain the continuance of a reconciliation; but when once it has voluntarily obtained the husband may even use force to complete the enjoyment of his marital rights. A new sentence of divorce became necessary to found the libellant's claim of alimony.

By the court. If the parties have been reconciled to each other since their divorce from bed and board, a fresh decree of divorce would be indispensably necessary to entitle the wife to alimony. We think the step-daughter has been mistaken as to the time of their last cohabitation; and several circumstances strengthen our opinion. It is moreover highly improbable, that while her former claim for a separate maintenance was pending, she would live with her husband. Adopting as a fact, that this instance of reconciliation occurred previous to the 15th September 1792, we award, that the respondent pay to the libellant 120 dollars annually, in half yearly payments, for her separate maintenance.

The respondent declared his intention to appeal to the High Court of Errors and Appeals, which was granted to him.

AT A CIRCUIT COURT, AT WASHINGTON, OCTOBER 1800.

CORAM, YEATES AND SMITH, JUSTICES.

Lessee of RICHARD CARROLL *against* ROBERT ANDREWS.

Where one settles and improves lands and obtains a warrant and survey and sells, and his vendee returns the former warrant as unsatisfied, and obtains a new warrant as for unimproved lands, he shall be postponed to an intervening claimant.

EJECTMENT for one messuage and 150 acres of land on the waters of Ten Mile Creek.

It was admitted, that the lessor of the plaintiff, and Samuel Parkhurst, under whom the defendant claimed, originally held the lands in question by improvement rights.

The facts turned out in evidence as follows:—Stephen Carter settled on the lands in 1785, built a house and barn, planted a nursery, and cleared about 30 acres. He took out a warrant dated—and obtained a survey of 400 acres and allowance in 1787, by Thadens Dodd, an assistant surveyor under David Redick, esq. Two years after, he removed to the Miami, leaving his farm under the care of Samuel Parkhurst, to be sold or rented. Parkhurst, as his agent, on the 25th November 1790, conveyed to the defendant 400 acres and allowance, as surveyed under Carter's warrant, in consideration of 140*l*. The defendant afterwards, on the suggestion of Daniel M'Farland, procured Carter's warrant to be returned unsatisfied; and on the 18th December 1794, obtained a new warrant for 400 acres on the head waters of Ten Mile Creek, adjoining the lands of Richard Carroll and Lawrence Craft, at 50*s*. per hundred acres, upon which 406 acres and allowance were surveyed by John Hoge on the 9th January 1796.

Previous to the last warrant, the lessor of the plaintiff made a settlement and improvement on the lands in question.

The court said, that they had been led into the evidence of the improvements made by Carter, by the opening counsel; but had the facts been fully stated, they would not have permitted such evidence to have been given, under the circumstances of this case. The conduct of the defendant was a fraud on every citizen of the state. Instigated by avarice, and the low cunning of M'Farland, he has abandoned his elder and better title, under Carter's warrant, and he must now be concluded by his warrant of 1794, as for unimproved lands. Though evidence has been received of valuable

improvements made by Carter, it cannot avail the defendant, who by his own voluntary act has defeated his claim thereto.

The defendant's counsel then relied on the bill of sale from Parkhurst of the warrant right and survey of Carter; and offered to show by parol evidence a purchase from Parkhurst of the improvement right.

But by the court. How can you entitle yourself under a warrant, which you have obtained a return of, as unsatisfied? Can you relinquish your interest under it, and yet retain your right against the commonwealth, whom you have attempted to defraud? One may lose an honest debt by playing a trick to come at it; as by adding a seal to a note, which was sufficient without it. 2 Vern. 162. You have produced a written conveyance from the agent of Carter, and are precluded from showing the transfer by oral testimony.

Verdict for the plaintiff.

Messrs. Pentecost and Simonson, *pro quer.*

Mr. P. Campbell, *pro def.*

Lessee of ROBERT PORTER *against* JAMES FERGUSON and ABRAHAM FEAGLEY.

The foundation of a survey must be shown. A survey once made, a new authority is necessary to ground a second survey. The presumption is, that every survey is made with the party's consent, and shall conclude him, unless there is fraud or improper conduct in the surveyor, and then the complaint must be followed up in reasonable time.

EJECTMENT for 139 acres of land on Mingo Creek waters.

The plaintiff claimed under an entry made by Francis Hull, of 400 acres on Monongahala river, with the Virginia commissioners on the 13th November 1779, on which a survey was made by Nevil and Ritchie of 269 acres and 139 perches, strict measure, on the 4th July 1785. The plaintiff set up another survey of 139 acres made by Thomas Stokely, and which he alleged was founded on a warrant of re-survey, or order of the board of property, but which were not produced.

The court said, that no benefit could be derived under the latter survey, unless by showing the warrant or order on which it was grounded. A survey having been once made, a new authority became indispensably necessary to justify a second survey. The legal presumption is, that the first survey was made with the full consent of the party and shall conclude him, unless fraud or

improper conduct can justly be ascribed to the deputy surveyor; and in such case the complainant must be followed up in a reasonable time. His laches will otherwise postpone him. These principles have been often laid down, and conduce to the peace and safety of the country. They were delivered particularly in the cases of Drinker's lessee *v.* Holliday, and Hollingshead's lessee *v.* Pollock, tried at Huntingdon, May assizes 1796, and cannot be departed from.

The plaintiff suffered a nonsuit.

Messrs. Pentecost and T. Campbell, *pro quer.*

Mr. Simonson, *pro def.*

AT A CIRCUIT COURT, AT PITTSBURGH, OCTOBER 1800.

CORMAN, YEATES AND SMITH, JUSTICES.

Lessee of NIAL M'LAUGHLIN *against* NICHOLAS DAWSON.

Actual settlements under the law of 3d April 1792, necessarily involve in them a personal residence on the land.

EJECTMENT for 400 acres of land on the north west side of the river Ohio, between Big and Little Beaver Creeks.

The parties claimed under their respective actual settlements on the land in question, and their pretensions appeared on the evidence as follows:

The lessor of the plaintiff on the 4th April 1792, crossed the Ohio, grubbed a small piece of ground, near to a cabin which had been erected and covered in by one Link in 1790, cleared a spot about 40 feet square, made 10 or 15 rails which he put up, and planted a few seeds of corn. On the 11th of the same month, he is found living and sleeping in this cabin of Links, and in the two following months, occupied in digging his small patch, planting potatoes and garden seeds. He makes his chimney and though notified of danger from the Indians, stays one night longer. In August, he makes a door to the cabin. In October, he carries out with him a bag of Indian meal, wooden vessels, tin cup, coffee pot, bake oven, and straw mat to sleep on, with a mattock and axe, (the last of which is much injured by one Daniel Swearingen, who claims the

land,) and occupies himself in making rails. Only he and Charles Philips were known to have resided on the north-west side of the Ohio, with the intention of making settlements in the year 1792.

In 1793 he makes several hundred rails, continues to grub, makes a small piece of meadow, and lives in the cabin, with his bedding and small household utensils about him. On the 16th May 1793. he obtains a warrant descriptive of the lands, on which he procures a survey of 400 acres and 68 perches, to be made by John Redick the assistant of John Hoge, deputy surveyor, on the 11th December following, and pays the surveying fees.

In 1794, the lessor of the plaintiff has a rolling frolic, collects and burns his logs, and clears the ground. He butts in with his oxen four or five acres of Indian corn, attends it during the season and raises a crop of near 60 bushels.

In 1795, he lives in his cabin and has his cattle on the land; he raises turnips and hauls them home.

In 1796, he continues his settlement, and adds four acres to his former field; and in 1797, he clears eight or ten acres more of land constantly living on the ground, except when immediate approach of danger from the savages induced him to remove occasionally therefrom.

The first commencement of the defendant's improvement was one day earlier than the opposing claim.

The defendant, on the 3d April 1792, crossed the river in company with two others, in search of lands. On that day, he planted ten or fifteen hills of Indian corn, deadened seven or eight trees, and marked the initial letters of his name with gun powder on the cabin of the aforesaid Link. In the two following months he planted 400 hills more of Indian corn, and hoed them occasionally. In September he grubbed two acres, rolled the logs, burnt them and the brush, and cleared the ground. In October he takes out a plough and horses, ploughs the ground he had cleared, sows two bushels of rye, and builds a good block house, about 12 feet square but does not cover it in. During this year he lived with his brother Benoni, at the mouth of Mill Creek, about four miles distance from the lands in dispute.

In February and March 1793, the defendant, with an assistant, makes clapboards, covers his block house, makes a door, and sleeps one or two nights therein. He clears four acres more land, and mauls rails for six acres. In the following month he incloses a field of seven acres with a fence, plants it with Indian corn, and afterwards attends it from time to time. He and George Clark are seen

together in the block house, and the aforesaid Daniel Swearingen, demands of John Redick, the assistant of the district surveyor, to make a survey in consequence of the defendant's settlement, which is refused on the ground of the earlier application of the lessor of the plaintiff to him for a survey. In due season, the defendant pulled his corn and lodged it in the loft of his block house. During 1793, the defendant was engaged as a six months man at Philips's station.

In 1794 the defendant was seen ploughing, and he disposes of his former crop of corn. He puts in more corn, which is seen growing. During this year he was also engaged as a volunteer on the frontiers.

In 1795 he put in $2\frac{1}{2}$ acres of Indian corn. He cropped with his brother Thomas at the distance of five miles from the lands, and lived with his father occasionally.

In February 1796, the defendant married and removed with his wife into the block house, where they have resided since. He had eight or ten acres cleared and under good fence, and in 1797, he grubbed and cleared three acres additional, near the block house.

It further appeared, that in 1792 the parties respectively warned each other against continuing their improvements, alleging their several claims, and that the plaintiff's warrant was not entered in the office of the deputy surveyor of the district until the 23d August 1793.

The cause was argued at considerable length, and with much ability, by Mr. Woods for the plaintiff, and by Mr. Ross for the defendant. After which the court charged the jury to the following effect, after recapitulating the testimony on both sides minutely.

The question is, which of these claims ought to prevail; and is naturally subdivided into two points; 1st, Whether the pretensions of the lessor of the plaintiff, as an actual settler, are preferable in law to the defendant's previous to the 23d August 1793, when his warrant was entered with the district surveyor? 2d, Whether since that period he is not vested with additional equity?

The act of assembly of third April 1792, 3 Dall. St. Laws 209, certainly had in view the population of the back country, and the forming a barrier on the frontier lands north and west of the rivers Ohio and Alleghany, and Conewango creek, by placing numerous families thereon. Whether the titles are derived originally from labor bestowed on the ground, or disbursement of cash, no warrant or survey shall, by the 9th section, vest any title to such lands "unless the grantee has made, or shall within two years

thereafter, make or cause to be made an actual settlement thereon, by clearing, fencing and cultivating, at least two acres for every hundred acres contained in one survey, erecting thereon a messuage for the habitation of man, and residing or causing a family to reside thereon for the space of five years next following his settling the same," &c.

Liuk's cabin being erected before the passing of the law, empowering the sale of these lands, gives no equity either to him or the plaintiff; nor can the planting of a dozen hills of corn, deadening seven or eight trees, or marking the defendant's name on the cabin, confer any right.

The improvements and cultivation of the lessor of the plaintiff will be found, on an accurate review of the evidence, to be inferior in extent to those of the defendant, in each distinct year, except 1797. The one depended on his own exertions, and was poor; the other could call to his assistance the services of his friends and connections, and commanded money. But the former possessed one strong prominent feature of an actual settler, a constant personal residence on the ground, unless when intimidated by the impending danger of a savage foe, encompassed by his small stock of provisions and bedding, and his few family utensils and implements of husbandry; while the latter was engaged as a volunteer in the public service, or lived with his father or brothers. In correct language, it is physically impossible that a man should have two homes at the same time. It may as well be said, that a body may be in different places the same instant. Acts are the most unequivocal proofs of the bent of the mind. Here M'Laughlin's intention to reside on the lands in dispute is completely demonstrated, by personal residence and a permanent adherence to the soil. The intent is executed in fact.

In *Ewalt's lessee v. Highlands*, (4 Dall. 161,) at May assizes 1799, in this place, we delivered our explicit opinion, on due consideration, that "a personal residence must, in the nature of things, accompany an actual settlement, unless impending imminent danger exists, which would prevent a man of reasonable firmness of mind, from continuing on the land;" and we are now more firmly impressed with the correctness of those sentiments. But it has been asserted at the bar, that this construction would throw actual settlers into a worse situation than warrant holders, under the proviso contained in the close of the 9th section of the act of 3d April 1792. This we deny. That proviso only respects the progress of the improvement in clearing two acres for every 100 acres in each survey, erecting a messuage thereon, and residing thereon for five years; it

does not relate to the commencement or origin of the title. In the reason of the thing, the rights of actual settlers must depend on the priority of their settlements; and a settlement necessarily involves in itself a personal residence of the party on the ground. And such is the legal idea of an improvement as depending on the act of 30th December 1786. 2 St. Laws 488.

The light in which we have viewed the first point, renders it unnecessary to go into the second, in the present case. The court, conceiving that the lessor of the plaintiff is the first actual resident settler on the lands in question, according to the true meaning of the legislature, and entitled in that character to recover the possession of the lands, will only add, that to his former right he has added the legal right of a warrant.

Verdict for the plaintiff.

The same principles were again discussed the same day in the case of the lessee of James Scott v. William Anderson, when the court adhered to their opinion as before delivered, and the jury were ready to give a verdict conformable thereto, but the plaintiff suffered a nonsuit.

Messrs. Woods and Sample, *pro quer.*

Messrs. Ross and Young, *pro def.*

RESPUBLICA *against* SAMUEL RAY.

A prosecutor under the election law of 15th Feb. 1799, who is entitled to one moiety of the fine, admitted a witness, on executing a release to defendant.
The word influence in the 18th section of this act, means using the party's endeavors, and does not imply that he must succeed.

THE defendant was indicted on the 18th section of the late general election law, passed 15th February 1799, (4 St. Laws 343) for that he, being an alien, and not qualified to vote in this state, did appear at an election in the town of Franklin, on the 8th October 1799, for the purpose of issuing tickets, and of influencing the citizens qualified to vote.

Edward Hale was an agent, appointed to attend at the said place of election, under the 3d section of the act, and gave information to a magistrate of the defendant's improper conduct, during the time of voting. He was indorsed as prosecutor, though reluctant.

Hale was offered as a witness, but excepted to on the ground of interest, as being entitled to one half of the fine on conviction, under the 24th section, the same not being specific; whereupon he executed a release to the defendant of his share of the forfeiture, and filed the same in court, and was thereupon admitted and sworn.

It did not appear that the defendant distributed any tickets on the election ground, but that he endeavored to procure five or six persons to give their votes for a certain ticket; whether he succeeded or not was unknown.

Mr. Sample for the defendant, insisted, that the defendant could not be legally convicted of influencing citizens qualified to vote, unless it could be ascertained that he prevailed on them to give their votes agreeably to his wishes.

But the court said, that if influencing means succeeding in the party's efforts, the law would be a dead letter; no conviction could take place, because no citizen is compellable to declare how he has given his suffrage. The word persuade has been construed to carry the persuasion into effect; (2 Ld. Raym. 889) and the same idea has been assigned to it in prosecutions for high treason during the revolutionary war. 1 Dall. 39. But the word influence has not the same extensive signification, and only means, to use the party's endeavors, though he may not have been able to carry his point. This appears clearly from the latter words of the 18th section, where it is said, "every person interfering in the manner aforesaid, shall forfeit and pay any sum not exceeding 30 dollars, for every such offence.

The defendant was acquitted of issuing tickets, but convicted of influencing persons to vote, and was fined 15 dollars.

GEORGE BICKHAM and JACOB REESE *against* WILLIAM IRWIN.

Indebitatus assumpsit will not lie on a collateral promise guaranteeing the payment of goods delivered to a third person, though the goods have been charged by the vendor to such undertaker.

Indebitatus assumpsit for goods sold and delivered; 1600 dollars. Pleas, *non-assumpsit* and payment, and *non-assumpsit infra sex annos*.

The defendant's counsel admitted the several articles charged in the plaintiffs' account, except 350*l.* 11*s.* 5½*d.*, said to have been delivered to James Lemon on the 25th April 1792, at the defendant's request.

It appeared that these articles were bespoke by the said James Lemon, and sorted out for him; but that the plaintiffs refused to deliver them to him, unless some person would guarantee the payment of the amount. The defendant being present agreed to the guaranty,

and the goods were delivered to Lemon, and charged to the defendant in the plaintiff's blotter.

The court were clearly of opinion, that though the goods had been charged by the plaintiffs to the defendant, yet it was manifest, from all the circumstances of the case, and from what passed at the time of the delivery, that the defendant's responsibility rested on his collateral undertaking as security for the goods, and not as principal in the contract; consequently the plaintiffs could not recover on a general *indebitatus assumpsit*, but should have declared in *assumpsit*, for the special undertaking.

It was at length agreed, that a juror should be withdrawn, and the plaintiffs be permitted to amend their declaration, on their consenting that the judgment entered in the Common Pleas as a security should be vacated.

Mr. Collins, *pro quer.* Mr. Ross, *pro def.*

Lessee of DAVID MEADE *against* FREDRICK HAYMAKER and LUKE STEVENS.

David Meade and others under the law of 9th March 1796, are entitled to take out warrants for vacant lands, notwithstanding the acts of 22d April, and 22d Sept. 1794. A precise warrant will take place of an earlier indescriptive one, before survey. It is the duty of a deputy surveyor to return the survey, and his neglect shall not prejudice the party unless in the case of a shifted warrant or application. The draft of a survey by a proper officer is strong evidence that the same was fairly and regularly made; and the presumption will stand till the contrary be proved. Improvements under the act of 30th Dec. 1786, and actual settlements under the law of 3d April 1792, have the same meaning, only the latter defines their extent, &c.

EJECTMENT for one messuage and 400 acres of land, surveyed on a warrant for Henry Meade.

The plaintiff claimed under a warrant to Henry Meade, dated 17th March 1796, for 400 acres north-northwest of Ohio and Alleghany and Conewango creek, between the outlet of Little Coneat lake and Sandy creek, granted in pursuance of the acts of assembly, passed on the 3d April 1792, and 9th March 1796.

This warrant was entered with the district surveyor on the 28th May 1796, and a survey was made thereupon (and seven other warrants) of 401 acres 150 perches, by William Power, on the 15th August 1796, who on the 17th of the same month, received his surveying fees 70 dollars.

A certificate of the receiver general was also shown in evidence, dated the 7th October 1800, that the warrant granted to the said Henry Meade, with eighteen other warrants, was paid by certificate No. 1, issued to the lessor of the plaintiff, agreeably to the act of 9th March 1796.

It appeared in evidence, that a survey, corresponding in every particular with that claimed by the plaintiff, had been made for the defendant Haymaker, under and in pursuance of his improvement, dated 2d October 1794. This survey was said to have been made on the 5th June 1795, and was returned into the surveyor general's office on the 16th January 1798, with a note subjoined thereto, that "David Meade claims this survey under his warrant." Haymaker lived both before and since 1795 in Cussewago, at a distance from these lands. No proof whatever was given of his having at any time made any improvement on these lands.

Stevens, the other defendant, had a family on the west branch of Susquehannah, under the care of one Jesse Glancey, his step-son. He took lodgings in Cussewago, and afterwards settled and improved a farm about two and a half miles distant from these lands, and which he now holds as an actual settler. Stevens, to make some compensation to Glancey, began a small improvement for him on the lands in question. On the 28d May 1796, he found a cabin erected on the ground, 14 feet square, not covered in; he dressed it for covering, sprouted 30 or 40 stumps, deadened about half an acre, and slept there that night. Next morning he cut a tree for clapboards, cut a door in the cabin, and went in quest of provisions. He came back on the 25th May, split the clapboards, covered in the cabin, and slept again there. On the succeeding day he returned to Cussewago, and on the 2d June he worked three days on the lands in controversy, clearing about half an acre, by grubbing, topping, heaping and burning brush wood, and slept there during that period. In the month following he again worked on the land, and cut logs, poles and brush, in order to sow rye, and planted two quarts of potatoes.

Jessie Glancey crossed the Ohio the latter end of May 1797, entered into an agreement with Haymaker, and now cultivates the land.

Mr. Ross for the defendants contended that the plaintiff's warrant was not authorized by the acts of 3d April 1792, or 9th March 1796, or any other law. Running warrants are not recognized by the act of 3d April 1792. They cannot operate as notice, according to the words of the 4th section, (3 St. Laws 210,) "in order that all persons who may apply for lands may be duly informed thereof." The 3d section directs, that "every application shall contain a particular description of the lands applied for." But this is not the case as to the present warrant, which calls for no specific spot, but generally for

lands between the outlet of little Coneat Lake and Sandy Creek. The intermediate space between them is a large tract of country.

The act of 9th March 1796, (4 St. Laws 16,) "to compensate David Meade and others," makes no alteration herein, but puts them on the same footing with other citizens. It barely gives them credit for the sums found due to them, either in taking out new warrants or paying arrearages on former grants; and they must necessarily be considered as subjected to every other regulation, form and condition imposed by existing laws. The warrant on the face of it expresses no condition of improvement, building a house, or residence for five years.

The survey also under which the plaintiff claims, has never been returned into the surveyor general's office, as the law requires. It is a mere transcript of the survey made for Haymaker on the 5th June 1795, and it is highly probable that it was not made by the deputy surveyors going on the land, after the issuing of the warrant. This is peremptorily required by the act of 8th April 1785, and by the 9th section thereof, (2 St. Laws 316,) "every survey theretofore made is accounted clandestine, void, and of no effect whatever." It is not made voidable, but *ipso facto* a nullity.

Another ground of defence presents itself. Under the act of 22d April 1794. (3 St. Laws 581,) no warrant shall issue after the 15th June then next for any lands in the new purchase, except in favor of persons claiming the same by virtue of some settlement and improvement. This law is not to be defeated by implication; and considering its provisions as subsisting, it is evident that the lessor of the plaintiff should have made a settlement and improvement before his warrant could regularly and legally issue.

Besides, the last clause in this act provides that, "no warrants, except those wherein the land is particularly described, shall effect the title or claim of any person, having made an actual improvement, before such warrant is entered and surveyed in the deputy surveyor's books." The word settlement is omitted.

Admitting that none but actual settlements are protected by the act of 3d April 1792, still as to warrants issued and located after the 15th June 1794, they shall not take place of mere improvements. It cannot be denied, that if the plaintiff's warrant is legal, it describes no certain place, and Stevens had begun an improvement for Glancey, his step-son, who may be considered as one of his family, and had slept at least five nights on the land; consequently the plaintiff is not entitled to recover.

By the court. Several exceptions, plausible in themselves, having been taken against the plaintiff's right, it becomes the duty of the court to examine them minutely. The public are materially interested in the establishment of certain principles regulating the titles of landed property ; on the correct application of those principles to the different cases which may occur, the peace and safety of society must depend.

The act of 9th March 1796, "to compensate David Meade and others," was grounded on this conformity to the provisions of the law passed on the 28th March 1787. (Loose Laws 270.) They had performed on their part, all the requisites necessary to their obtaining the benefits of the said law ; and it was but just, that the persons complying with the terms of the law aforesaid, while the law was in existence, should be entitled to the benefits of the same." By the 9th section of the former law, the claimants under Pennsylvania rights were to be allowed an equivalent for their claims, either in the old or new purchases, at their option ; and "warrants and patents, and all other acts of the public offices relating thereto, were to be performed free of expense." Possessed of these meritorious claims, they are allowed by the law of 9th March 1796, to have a credit in the books of the receiver general for the sums justly found due to them, either in "taking out new warrants in any part of the state where vacant land might be found, or paying arrearages on former grants." To effectuate the declared intentions of the legislature, and preserve the stipulated public faith inviolate, these persons must necessarily be entitled to new warrants, notwithstanding the general expressions in the former acts of 22d April 1794, or its supplement of the 22d September 1794, (3 St. Laws 636,) where the lands were not previously improved. No certificates of judges or justices were necessary in the case of other citizens applying for warrants for lands, lying north and west of the rivers Ohio and Allegheny, and Conewango creek, and therefore were not to be exacted from this class of public creditors ; but every condition of improvement, building a house and five years residence, and every other regulation were equally binding on them as others.

But it has been objected, that the warrant of Henry Meade is indescriptive of any particular place, and wants precision. It is answered, that it is reduced to certainty by the survey. The effect of the loose wording thereof might have been, that if a subsequent warrant had come to the hands of the deputy surveyor, especially describing a particular spot between the outlet of Little Coneat Lake and Sandy Creek,

before a survey has been made on this indeterminate warrant, it would have been postponed thereby.

As to the survey not having been returned, it was the fault of the district surveyor, who had received his legal fees, and shall not prejudice the party, in any other case than that of a shifted application or warrant. Such have been our uniform decisions.

Every presumption is in favor of a draft of survey duly certified by the proper officer. It is powerful evidence, that a survey was fairly, regularly, and legally made, unless it be rebutted by other proof. The security of landed titles rests greatly on this rule, and it would be dangerous in the extreme to shake it. No testimony has been adduced to show that this survey was not made by the deputy surveyor going on the ground, and therefore the presumption stands in its favor.

Much reliance has been placed on the last clause of the law of 22d April 1794. It is certainly penned very incorrectly. It might at first be supposed to imply, that warrants particularly descriptive might affect the equitable claims of previous *bona fide improvers* of the same lands. But it will scarcely be contended, that this could have been the real intention of the legislature, considering the different expressions of the public will, in a variety of acts, since the revolution, on the subject of improvement rights. In the preceding part of the section, the words settlement and improvement seem ranked as synonymous expressions, though the latter word only is inserted in the close of the law. In fact, an improvement, as defined by the act of 30th December 1786, 2 St. Laws, 488, has the same meaning, as an actual settlement under the act of 3d April 1792, Addis. 335, except that the latter points out precisely the extent of it, by clearing 2 acres for each 100, erecting a messuage, and residing thereon five years. The former law describes an improvement "as an actual, personal, resident settlement, with a manifest intention of making it a place of abode, and continued from time to time, unless interrupted by the enemy," &c. We are however of opinion, that if a doubt could be supposed to arise under the expressions of the act of the 22d April 1794, they are removed by the supplement thereto, passed at the next sessions on the 22d September, 3 St Laws 636, which in several instances alters and supersedes the provisions of the first act, and secures settlements and improvements made under the law passed 3d April 1792.

How then stands the pretensions of either of the defendants? Though Haymaker had a survey made for him, he had no settlement whereon to ground it; and therefore it is a mere nullity, and gives no right whatever.

Stevens began to make what has been styled an improvement, three days before the plaintiff's warrant was entered with the district surveyor. But he had an actual settlement, $2\frac{1}{2}$ miles distant, whereon he resided, and which he now holds, as an actual settler. He could not have two resident settlements, two homes at the same moment. If he could secure the title of more than one place by actual settlement, wealthy men might do the same thing to any extent, and the poor would thus be prevented from all means of obtaining land, which could never have been intended.

Glancey can derive no claim under either Haymaker or Stevens; he himself did not cross the Ohio, until the latter end of 1797, more than 9 months after the survey.

On the whole therefore, the result is, that the plaintiff has the only right recognized by the law, and we are clearly of opinion, that he is entitled to recover.

Verdict for the plaintiff.

Messrs. Sample and Collins *pro quer.*

AT A CIRCUIT COURT, AT GREENSBURGH, NOVEMBER 1800.

CORAM, YEATES AND SMITH, JUSTICES.

Lessee of BERNARD GRATZ *against* PATRICK CAMPBELL.

Evidence of improvements made to the westward in consequence of a military permit shall not be received unless an office right has been taken out therefor by the beginning of August 1796.

EJECTMENT for 300 acres, on Sewickley Old Town creek.

The plaintiff claimed one moiety of the land under a special order to David Franks, of the 1st April 1769, a survey thereon made 1st June 1769, and a conveyance from Franks.

The defendant offered to show, that he made a settlement on these lands in 1761, before the Indian purchase, under a military permit, which he asserts to have been lost: and that Christopher Hayes, the agent of the said Franks, had agreed to the running of a line between him and his principal. It was admitted, that he took out no office right until 1784.

But the court said, that such evidence in a case so circumstanced, would introduce the utmost confusion, and impair former determinations.

Here it is not attempted to show by parol evidence, that such a military permit ever existed. But if this had been shown, it was incumbent on the party to obtain an office right after the opening of the land office on the 3d April 1769, or in a reasonable time afterwards ; and no case has yet gone further than by extending that time to the month of July following. Here the warrant was not obtained till 1784, and the military permit had long before lost its preference. As to the consent of Hayes to a line, it can have no effect unless he was authorized to settle boundaries. The evidence was overruled.

Verdict *pro quer.*

Mr. Young, *pro quer.*

Messrs. Ross and Sample, *pro def.*

Lessee of FREDERICK MERCHANT and the heirs and representatives of
PETER BRIGHT *against* JOHN MILLISON.

An improver of land, who takes out an office right and does not refer thereon to his improvement—must *prima facie* be supposed to abandon his improvement. The presumption that a survey has been made with the party's consent may be rebutted by circumstantial evidence.

Practice of surveyors as to surveying above 10 per cent surplus lands.

EJECTMENT for 300 acres of land in Union township.

The plaintiff claimed under a warrant to Fredrick Merchant and Peter Bright for 250 acres of land on the waters of Big Sewickley, adjoining land of Jacob Millison dated 10th February 1786 ; upon which a survey was obtained on the 12th April following of 268 acres and 155 perches, and a patent issued thereon, on 27th October 1787.

It was admitted and proved, that near thirty years ago Jacob Millison, the father of the defendant, purchased a tract of land from William Thompson then surveyor of the district, who surveyed it. There was then no other claim to it, nor was there any dispute with any of the neighbors about the boundaries.—In March 1780, Millison had a house, a barn, and sixty acres of land cleared on it.

It appeared in evidence, that on the 4th December 1784, Jacob Millison obtained a warrant for 300 acres including an improvement on the waters of Sewickley, adjoining John Perry and Joseph Irwin, interest to commence from 1st March 1780 ; and on the same day, he obtained another warrant in the name of Philip Millison, his son, for 300 acres, including an improvement on the waters of Sewickley, adjoining lands of Hugh Alexander and Jacob Millison, interest to commence from the 1st March 1782.

On these warrants, Peter Light, the assistant of John Henderson, deputy surveyor, made a large survey of 900 acres on the 26th April 1785, but afterwards returned above 300 acres on each warrant. What passed at the time of surveying, or before the returns, between Light and Millison, did not appear in evidence ; further, than that Frederick Merchant (one of the lessors of the plaintiff, and who was examined as a witness at the defendant's instance, and by his own consent) swore, that Henderson told him, he had been informed by Light that Millison had thrown out part of his lands, and advised him to take out a warrant for it.

It appeared in evidence, that there was no marked line between the lands in question and those returned for Millison ; and that this supposed line runs about 50 perches from the house of the latter, excluding about $1\frac{1}{2}$ acres of his improved meadow and good bottom land equal to any part of the farm, and including a quantity of poor, thin land, on the back part of the survey. Immediately after the plaintiff's warrant was taken out, Millison built a cabin on the lands in controversy, and retained the possession of them. On the 23d October 1786, Jacob Millison, as administrator of his father Jacob Millison, obtained a warrant for 200 acres in trust for the heirs, adjoining Peter Thomas, Philip Millison and others, on the waters of Sewickley, and procured a survey of $220\frac{1}{2}$ acres and allowance by Benjamin Lodge, on the 12th September 1786, and a patent on the 12th October 1786, which included the lands in question.

Three surveyors were examined, who declared, that where there was no dispute, they found little or no difficulty, when they returned more than 10 per cent. surplus, on surveys made by them since the revolution. In some instances 350 and 360 acres had been surveyed and returned on warrants for 200 acres ; and in some others double the quantity of the lands mentioned in the warrants, and they had been all accepted.

In the course of the cause it was objected that the improvement on the land in controversy should not be received in evidence for the defendant, his warrant of 1786 not referring to an improvement ; and the case of Carrol's lessee v. Andrews, lately at Washington, was cited and relied on.

Sed per cur. The exception would have been well taken, and would hold in its full force, if Millison had abandoned his improvement, and agreed to the return of survey as made by Light. But the defence rests on the opposite ground, and that he never could be supposed freely

to have given his concurrence, to such returns, abridging himself of part of his improvement, and the best part of his land. Whether the assistant surveyor has been guilty of a legal fraud or not, is almost the only question to be decided.

This cause had been tried before President Addison, in March term, 1793, when a verdict passed for the defendants. Addison 52. It was now fully spoken to on the merits, by Messrs. Sample and Collins for the plaintiff, and Messrs. Ross and Young for the defendant; (and Yeates, J., being so hoarse with a cold that his voice could not be heard,) Smith, J., gave the charge of the court.

After stating particularly the written as well as oral testimony, he observed, that if the paper titles only were to be judged of, the plaintiff's title must prevail, being the earliest. But other circumstances deserve consideration. Light, in April 1785, surveyed all the lands, under the two warrants of Millison. The former survey by Thompson being made without authority, has no weight or effect whatever. The improvement of $1\frac{1}{2}$ acres of meadow would give a preference, unless it was afterwards abandoned; because, no man shall by his act defraud the state, and yet gain a benefit by his improvement. The first legal presumption which arises is, that the return of the survey made by Light was the real survey executed by him on the ground, with his consent, and that he relinquished the small portion of improved meadow, and agreed that the lands in question should be thrown out of the survey. But this presumption may be encountered by other proof, either direct or circumstantial. Two strong circumstances are adduced for this purpose. The first is, that no marked line appears on the ground, dividing the lands returned from those in controversy. The second is, that lands of a much inferior quality are taken into the survey, while $1\frac{1}{2}$ acres of good meadow and the best bottom land are left out, by a line which passes within fifty perches of his door. It has been truly said, that no man, unless in a state of derangement, would prefer bad to good land. We have no evidence of this having been done with the direction, consent or knowledge of Millison; and here are two presumptions opposing the common and legal one arising from the return. A surveyor certainly has no right to garble lands at his will and pleasure, and return what parcel he thinks proper. In an instance like the present, he should have stated the contents of the first survey to his employer and taken his directions thereon. I, however, for my own part, do not go so far as the witnesses, with respect to surveying and returning surplus lands. I rather think the deputy was not obliged to make a return of so large a survey as 900 acres, under warrants for 600 acres, and that the land office was not bound by their

usage to accept so large a return. The first instructions to the deputy surveyors not to survey more than a surplus of 10 per cent. on each hundred acres contained in a warrant, took place in 1766, and arose from a desire to accommodate the different appliers with lands, and the fees of the different officers were regulated thereby. But when it was discovered that the proprietary institution might be evaded by taking out warrants in the names of other persons, the rule of practice still continued, though the reason of it had long before ceased. However, before the revolution, whenever the deputy surveyor certified that the surplus lands beyond the 10 per cent. were only desirable for the lands in the warrants, there was little hesitation as to the accepting of the return of survey of such surplus. I know of no rule on the subject. If the present contest rested merely on the point, whether 450 acres should not have been returned on each of Millison's warrants, as a matter of right, I should incline against the defendant, but I give no decided opinion thereon. The practice of surveyors since the revolution would have much weight.

Upon the whole, the question turns chiefly on this point: whether Millison knew and consented, that these 220 $\frac{1}{2}$ acres should be thrown out of his survey. If this was the case, and he concurred therewith at the time, he and his heirs shall be bound by it, however injudicious the act was. On this head, we have stated, that the legal presumption is in favor of the present plaintiff, and have also shown the circumstances repulsive of this presumption, which will have their proper weight in the minds of the jury. Certain it is, that Millison soon evinced a dissatisfaction with the conduct of the deputy surveyor's assistant, by erecting a cabin on the disputed ground, directly after he had heard that the adverse warrant had issued from the office. And the meadow fence standing on the lands in controversy, was full notice to the lessors of the plaintiff to put them on the inquiry respecting the right of the soil. Under all the circumstances of the case, as disclosed on the present trial, we both are strongly inclined to think there should be a verdict for the defendant.

Verdict *pro def.*

; AT A CIRCUIT COURT, AT BEDFORD NOVEMBER 1800.

CORAM, YEATES AND SMITH, JUSTICES.

Lessee of JACOB STEVENS *against* MATTHEW TRACEY.

The law of 30 December 1786, is declaratory of the ancient doctrine of improvement rights.

EJECTMENT for 216 acres of land in Morrison's Cove. The plaintiff claimed under a warrant to Ludwig Wissinger for 200 acres in Morrison's Cove, on both sides of the Roaring Spring Run, adjoining John Ulrey on the northwest, and Samuel Wallis on the southwest, dated 14th September 1786. On the 9th November 1786, Wissinger conveyed to Stevens, in consideration of 20*l.*, and he two days after procured a survey of 216 acres and allowance, including the lands in controversy.

The defendant's pretensions were as follows: One Jacob Neff came up into Morrison's Cove 1776, and improved, (as it was called,) within a survey regularly made for Henry Drinker, sometimes called Samuel Wallis's land. The appropriation of this tract was notorious in the neighborhood, and Neff, before he began to work, was well acquainted with it. He erected a cabin thereon, about 20 perches from the line, cleared lands about it, and his clearing beyond the line occupied about one or one and a half acres. He expressed his intentions of building a mill on the lands in dispute, designing to dig the race higher up, near the cabin, and procured the water to be levelled. He cut down a few trees, and cleared a small patch for the scite of the mill, but did no other work relative to the mill, though it was said mill irons were seen in his smith's shop. During this period he lived with his father, three or four miles distant, and chiefly worked on the land of Wallis. In 1777 the settlement was broken up by the Indians, and Neff went off with the other settlers, and returned with them after the peace in 1784. He and his wife still continued to live on the place improved by his father, working occasionally on the lands of Wallis, which he afterwards purchased; but he bestowed no further labor on the lands in question until the fall of 1786, when he heard of Wissinger's warrant having been issued. He then removed the logs of the cabin from the land of Wallis, which had been thrown down during the war, and erected them on the land claimed by the plaintiff. Just before the plaintiff's survey, he began to dig a race; eight or nine perches were dug when the survey

was completed: this work might have occupied two men for two days.

On the 14th November 1786, the said Jacob Neff obtained a warrant for 50 acres, including his improvement in Morrison's Cove, adjoining Wallis's land at the mouth of Roaring Spring Run, interest to commence from 1st March 1776, and procured a survey of 52½ acres and allowance on the 6th February 1787. On the 21st February 1787, Stevens entered a *caveat* in the land office against Neff's survey, and the first Monday in November following was appointed for the hearing. But without any hearing, or the *caveat* being withdrawn, a patent issued to Neff on the 10th March 1787. In the same year Neff built his mill, and Stevens afterwards commenced an ejectment against him, which came on to trial at Nisi Prius on the 28th May 1798, when a verdict was given for the defendant; but the *postea* and judgment thereon were not produced at the present trial.

The court summed up the evidence to the jury, and stated, that on the conflicting written titles, the plaintiff was entitled to recover by possession. His warrant was descriptive of the lands, and preceded the defendant's two months. His survey was three days elder than the warrant of Neff. The procuring of a patent before the day appointed for hearing of the *caveat*, must have been through oversight, mistake, or fraud, and cannot injure the plaintiff's pretensions.

It remains then only to consider the unwritten evidence. Neff, during the revolutionary war, fixed himself within the known lines of Wallis's survey, and builds a cabin. He accidentally clears a small spot over the line, cuts down a few trees, clears the place, and says he will erect a mill there. He is driven from the cove the succeeding year, returns in 1784, and neither in that year nor in 1785 does he prosecute his intentions. His home, during all the time, is with his father, at the distance of near four miles. When he finds that Wissinger's warrant is taken out, and the survey about to be made, he bestows four days labor in digging a race. We would blush, if we said these different acts gave Neff an improvement right. The law 30th December 1786, (2 St. Laws 488,) is declaratory of the ancient doctrine of improvements, truly understood; but the case of Neff has not one characteristic feature of an improvement, and it would be highly dangerous to the public security to give it that effect. Here is a mere clearing by mistake over ancient lines, without an actual personal resident settlement, an intention of making it a place of abode, or the means of supporting a family. What signify his intentions of building a mill, not prosecuted? Or of what avail was the removal of the old

cabin logs in the fall of 1786? We have no legal evidence of the former trial, or on what evidence the verdict passed, but if we had, though the former verdict is persuasive evidence, yet the jury are now bound to decide for themselves, on the testimony adduced.

It may possibly be that the defendant may have bought since the former trial, and in confidence of that verdict. But of this we have no evidence, and from what appears, we are bound to consider the defendant as Neff's tenant.

Verdict, *pro quer.*

Messrs. Hamilton and Brown, *pro quer.*

Messrs. Riddle and Clark, *pro def.*

AT A CIRCUIT COURT, AT WASHINGTON, OCTOBER 1800.

CORAM, YEATES AND SMITH, JUSTICES.

JOSEPH CREACRAFT and wife *against* CALEB DILLE.

S. C. Addison 350.

Devise by husband of one third of his personal estate to his wife, and the use of one third of his lands while she remained his widow, and also one cow over and above her thirds and all the rest of his estate to his children will bar the widow of her dower on her acceptance of the devise.

DOWER. Pleas, satisfaction and acceptance.

The following case was stated for the opinion of Yeates and Smith, Justices, at a Circuit Court, held at Washington, in October 1800.

Joseph Creacraft having married the widow of Jabez Baldwin, brought a suit for her dower of one third part of 399 acres of land.

Jabez Baldwin, by his last will dated 10th September 1778, gave to his wife now the wife of Creacraft, one third part of all his moveable estate, together with the use of one third of his lands, while she remained his widow, and also one cow over and above her thirds; and gave all the rest of his estate to his eight children.

Annexed to the will, and of the same date, was a note signed by his wife, stating that she voluntarily agreed to the above will. And on the 4th March 1791, her then husband, Joseph Creacraft, gave a receipt to Caleb Baldwin, one of the executors, for a cow over her third part, agreeably to the will of Jabez Baldwin.

It is also agreed, that a conversation was had between the person who drew the will, and Jabez Baldwin and his wife, respecting the will, and that he drew it according to their directions ; that he told Baldwin that this was no more than the law would give her ; that Baldwin then desired him to put in a cow besides the thirds ; that she declared herself well satisfied, and after his death desired the executors to prove the will, and said, though she knew she could have her thirds, she did not want more than her husband had given her, nor to hurt the children, for her mother had done so, and got a great estate and ruined the children ; and that when the property was appraised, she chose and took a cow, as the one given her by will, and declared herself satisfied.

The question submitted to the court without argument was, whether, under all the circumstances of this case, the widow was barred of her dower ?

The court, with the consent of counsel, continued the case under the Supreme Court in December term following, and afterwards in March term 1801, with the concurrence of the Chief Justice, on full deliberation, directed that judgment should be entered for the tenant.

In *Hamilton and wife v. Buckwalter*, wherein judgment was rendered for the tenant in December term 1798, John Patton, the testator, devised to his wife all his lands in Lampeter township, to hold during her natural life of widowhood, she making no waste thereupon ; but in case she marries, she is then to leave the plantation, she receiving 50*l.*, a horse and saddle, with her bed and bed clothes, &c.

Devise to the wife of all the husband's lands during widowhood ; Dyer held it to be no bar of her dower ; but Weston and Benlows determined otherwise, and that it was as strong as a jointure, and if she accepted a jointure she cannot be endowed. Moor. 31.

An estate for life on condition is an estate for life, and within the words and intent of stat. 27 H. 8, c. 10, if the wife after the death of the husband accepts it. A jointure is a competent livelihood of freehold for the wife to take effect immediately after

the death of the husband, for the life of the wife, if she herself is not the cause of the determination or forfeiture of it. 4 Co. 2, *b*. Every grant *durant viduitate* is an estate for life. 4 Co. 30, *a*. Lit. § 380. Co. Lit. 42, *a*, 234, *b*.

An estate during widowhood for jointure is an estate to the widow during life, and is a jointure within the act. 4 Co. 3, *a*. Dy. 317, *b*. New Benloe 210. Vernon's case, which was a feoffment by the husband after marriage of part of his lands to trustees, to the use of himself for life without impeachment of waste, then to the use of his wife for life, and after her deceased to the use of the right heirs of the husband.

DECEMBER TERM, 1800.

CORAM—SHIPPEN, CHIEF JUSTICE, YEATES, SMITH AND BRACKENRIDGE,
JUSTICES.

EDWARD STILES *against* CADWALADER GRIFFITH.

Replevin will not lie for goods seized for non payment of the city water tax.

MR. INGERSOLL, in behalf of the city corporation, moved to quash this replevin, issued for goods seized in execution for the water tax.

Mr. Blair for the plaintiff, objected thereto. If the motion is made under the act of 3d April 1779, (1 Dall. St. Law, 796,) the words are “all writs of replevin granted or issued,” &c. in the past tense, and relate only to replevins taken out before the act was passed. When the legislature in the 5th section mean to guard against the entry of judgments, and issuing of attachments or executions against persons attainted of treason in future cases, they use proper words for that purpose, “or which shall hereafter be so entered or issued,” &c. The law contemplated the war, in which we were engaged with Great Britten, and was not intended to continue in operation after the conclusion of the peace.

[*Per cur.* The words “granted or issued,” refer in point to time, to the motion to quash the replevins, and which they must necessarily preceed.]

The words of the 3d section are “goods or chattels seized, by any constable, collector of the public taxes, or other officer, acting under the authority of the state,” &c. Corporation taxes are not included herein.

[*Per cur.* Are not the city assessments public taxes.]

If an inferior jurisdiction issues an execution, replevin will lie for the goods taken by that execution Gilb Dist. and Rep. 122. Thus in a replevin, the defendant was put to justify by a condemnation before a justice of peace, for not entering strong waters, and a warrant on that for levying 20s. fine on the plaintiff. 3 Lev. 204.

Per cur. The modern cases are otherwise. An attachment was granted against a person, who took out a replevin for his goods seized under a warrant of a justice of the peace. 1 Barn. B. R. 110. So against an under sheriff, for granting a replevin of goods distrained on a conviction for deer stealing. 2 Stra. 1184.

Mr. Blair. The city water tax is illegal and cannot be supported. We wish to try its validity.

Per cur. Then bring trespass against the collector, and you may go into the inquiry. The court will not support this form of action in such a case, nor suffer such an abuse of their process. If one man may bring a replevin, where his goods have been taken for taxes, so may every other person, and thus the collection of all taxes might be evaded. Independently of the act of assembly, we are bound to quash the writ; and it was quashed accordingly, without hearing the counsel for the corporation.

ANN KEPPELE executrix of GEORGE KEPPELE *against* HENRY ZANTZINGER surviving partner of GEORGE KEPPELE.

On a *capias ad computandum* issued against a defendant, court will moderate the bail according to the circumstances of the case.

ACCOUNT Render. Judgment *quod computet* had been entered last September term, and auditors had been appointed by the court. Two several days had been fixed by the auditors to take the account, but the defendant had made default. Whereupon Mr. Levy for the plaintiff, issued a *capias ad computandum* against him, and marked bail in 20,000 dollars.

Mr. Ingersoll, for the defendant, now moved to discharge the bail, or at least to moderate the sum. He insisted, that there was a balance due from the plaintiff, if a full settlement was made, and showed some propositions made on her behalf to the defendant for a compromise. But the present bail indorsed on the writ, amounts to an actual imprisonment, unless the defendant be in affluent circumstances. The court must exercise their discretion in fixing the sum.

Mr. Levy, for the plaintiff, insisted, that the writ of *capias ad computandum* lies of right, if the defendant does not appear after a judgment *quod computet*. 1 Vin. Abr. 171. U. Cro. El. 82. In this last case, the plaintiff demanded 100l. and the defendant found *mainpernors* in 200l. to enter into account before the auditors, and finish it, &c. Here the plaintiffs' demand is 10,000 dollars, and the

defendant has twice neglected to appear before the auditors, without assigning a good reason for his absence. He moreover refuses to submit his partnership books to the inspection of the plaintiff's agent, which evinces that his intentions are not fair.

By the court. The *capias* has been rightly issued ; but undoubtedly the *quantum* of bail cannot depend on the plaintiff's demand, but must rest in our discretion, which should be regulated by the amount of the probable balance. But here the defendant has been guilty of two defaults in not appearing before the auditors ; and therefore let him give bail in 1000 dollars, to appear before the auditors and account, &c.

ISAAC NORRIS and JOHN HALL *against* the President and Directors of the Insurance Company of North America.

In covenant of the plea of covenants performed, defendant must begin the evidence, and conclude to the jury.

A policy of insurance may be explained and controlled by the written order to make insurance.

To subject insurers to a loss, the risk run must correspond with the risk understood and intended to run at the time of subscription.

Insurers are bound to inform themselves of the course and usage of trade.

COVENANT against the defendants, on a policy of insurance, subscribed by Charles Pettit, their president, under their common seal, upon all goods laden or to be laden on board the brig "American," Thomas Town, jun., master, at and from *Port de Paix* to Philadelphia, with liberty to touch at one other French port, on the north side of the island of Hispaniola, beginning the adventure on the said lawful goods and merchandizes from and immediately following the loading thereof on board of said vessel at *Port de Paix*.

This policy was subscribed on the 9th March 1797, for 12,000 dollars at a premium of 8 per cent. and if no loss happened, 2 per cent. to be returned, if the vessel proceeds direct from *Port de Paix* to Philadelphia. It was expressly declared therein, that the insurance was made on goods and cash.

The plaintiffs' written instructions to the office of the defendants, were "insure 12,000 dollars property on board the brig American, Capt. Thomas Town, jun., at and from *Port de Paix* to Philadelphia." It appeared by a witness, that their chief object was to have this cash on board the brig, then understood to be at *Port de Paix*, insured, and that they said at the office, they had been informed this would not be the case unless the specie was particularly mentioned.

Captain Town made two protests. The first at *Port de Paix* stated, that he sailed from Philadelphia on the 31st October 1796; cleared out for St. Bartholomew's, bound to Marigalante, where he arrived on the 18th November, and was refused permission to trade. He sailed next day, and on the 20th arrived at Port Petre in Guadaloupe, now called Port Liberte, where he sold his cargo, and received on board coffee, cotton and sugar. From thence he proceeded to St. Thomas's and arrived there on the 5th January 1797, and sold his cargo for 18, 247 dollars. He there bought 98 barrels of flour, and on the 22d January sailed from thence for Cape Francois, but being chased off Monte Christo by an English man of war, a brig and cutter, was forced on the 26th into *Port de Paix*. The administration at *Port de Paix*, on the 27th January, put a guard of soldiers on board the brig, and seized his papers and sent them to Cape Francois. He was obliged to go to the Cape to plead his cause, and on the 31st his papers were there returned to him, and declared to be in good order by the commissary. On his return to *Port de Paix*, the captain found the guard on board the brig, and was told by the administration, that the money should be lodged in the treasury, and he should receive payment in coffee: whereupon he put the specie under his bed, and affixed four seals to the lock of his cabin door. On the 4th February, the officers of the administration forced open his cabin door, and took away the specie, consisting of 15,449 dollars, and landed it, promising to deliver him coffee in return.

Captain Town's second protest, made at Philadelphia on the 29th May 1797, enumerated the preceding particulars, and then stated, that a few days after the administration took the specie, they forcibly seized his 98 barrels of flour, also promising him coffee in payment. He then went to Cape Francois, and on the 13th February presented a memorial to *Santhonax*, who directed the chief of the administration at *Port de Paix* to make him payment in coffee at 23 *sous* per lb. Hereupon he solicited payment without effect until the 10th March following, and then again went to the Cape, and on the 19th March presented another memorial to *Santhonax*, who ordered him back to *Port de Paix*, with a recommendation in his favour, but it was likewise fruitless. On the 30th March he presented a third memorial to *Santhonax*, who directed the *ordonnateur* to make him payment in colonial produce within fifteen days at furthest, and he thereupon obtained in coffee duties and provisions, to the amount of about 35,000 livres, and after refusing to sign a *proces verbal*, he sailed from *Port de Paix* on the 13th May, and arrived in Philadelphia on the 27th May. In this second protest, Captain Town

was joined by Andrew Donaldson his mate, who deposed to all the facts which happened in the brig ; and the mate's examination under a rule of court confirmed his protest.

It was proved to have been the general usage of the French West India islands, both before and since the American revolution, that when any foreign vessels arrived in the ports, a guard was immediately sent on board, who received the ship's papers, which were kept for inspection, and in many instances not returned to the captain, until he had delivered to the government officers the several articles which they required, which were generally paid for in colonial produce. This practice extended even to French vessels, and particularly obtained in St. Domingo in the year 1786 and 1797. At *Port de Paix* there was not tribunal for adjudication, but vessel's papers were usually sent from thence to Cape Francois. The above custom was generally known to all persons, who traded to the French islands in the West Indies ; and a respectable merchant swore, that he would not have demanded a higher premium, on being informed, that a guard had been put on board a vessel in one of the French islands ; where the papers were seized with a declared intention of selecting part of the cargo for the municipality, the case would be otherwise, the payments therefor by the administration not being experienced to be always punctual and regular.

The deposition of Captain John McEver was read in evidence, stating, that on the 28th January 1797, he saw Captain Town at Cape Francois, who informed him that he had 16,000 dollars, 100 barrels of flour, and some dry goods, on board the brig American at *Port de Paix*, and that the administration had taken charge of his vessel and papers there by a guard, but that Santhonax at the Cape had returned his papers again. McEver arrived in Philadelphia on the 20th February 1797, and had informed the plaintiffs of what he knew, and all the particulars disclosed to him by Captain Town.

But these particulars were not communicated to the defendants previous to the subscription of the policy.

It was said by the plaintiffs, that the defendants had received their premium of 960 dollars, after they disputed the loss ; but it turned out on examination, that a note was given for the premium, which fell due on the 9th-12th June, and it had been paid when it came to maturity.

The plea to the suit was, covenants performed ; and the plaintiffs' counsel contended the point of order, as to who should conclude ?

Sed per cur. The plea is affirmative, and as it rests on the de-

endants, there is no doubt but they shall begin and conclude. 2 Tri. per Pais 367. Old Law Evid. 3, pl. 8, 3 Leon. 162. Litt. Rep. 36. Goldsb. 23.

Messrs. Ingersoll, E. Tilghman and Moylan, for the defendants, put their defence on two grounds: 1st, That the object insured never existed. 2d, Improper concealment of facts known only to the insured.

This is an insurance on the homeward bound cargo, and the outward risk must cease before the commencement of the inward. If the plaintiffs effected no policy to be subscribed on the outward voyage, they stood their own insurers; and the question must be considered on principal, as a contest between the underwriters on the outward and homeward bound cargo. The terms of the policy clearly show, that the insurance was intended for the property on the return voyage: the words are beginning the adventure on the said lawful goods and merchandises from and immediately following the loading thereof on board of said vessel at *Port de Paix*," &c., and therefore the policy did not take effect till the goods were laden in that port. Flour and dry goods as well as silver, were on board. It could never have been intended to bring the flour or dry goods back to Philadelphia, but to have converted these articles and the specie into colonial produce, and thence have formed a return cargo. Whereas, if the policy had attached on those specific articles, it would have ceased when they had been exchanged for coffee, sugar, &c., which could not have designed.

In case of proceeding straight from *Port de Paix* to this city, 2 per cent. of the premium was to be returned; but as no merchant in his senses would return immediately hither with flour and dry goods from the West Indies, it follows, that these were not the particulars of the return cargo meant to be insured. The specie cannot be separated therefrom. The liability of the defendants is not to cease as to part of the property, and continue as to the silver. If, however, any plain circumstances could be shown, indicating the intention of the plaintiffs to insure these specific silver, flour, and dry goods, then on board the brig, as a return cargo, we would agree that the formality of landing and reshipping them ought not to be insisted on, and they might be considered as laden at *Port de Paix*. But this suit is brought in covenant, on the general expressions in the policy, and is not founded on any special undertaking of the defendants.

The note for the premium was given without defalcation, and was taken as cash. The defendants had thirty days after notice of a loss before they were bound to pay even an undisputed loss.

The plaintiffs' demand of a loss was not made until the 16th June 1797, and their note fell due on the 9th-12th June. But if even the defendants obtain a verdict, they are not bound to return the whole premium; because, as coffee has been laid in to the amount of 35,000 livres, the loss must be adjusted. An insurance on goods "at and from" a place, means from beginning to load them. Wesket 24.

As to the point of concealment, if it was of a material circumstance, which if communicated would have prevented the subscription of the policy, or have caused a higher premium to be demanded, the policy is thereby vitiated; and it is of no moment whether the neglect arose from accident or design. Park. 195. The case of the Captain being restricted to one of three routes, from one port to another, shows to what extent this doctrine has been carried. 7 Term Rep. 162. If the insurance of the identical 98 barrels of flour was contemplated by the plaintiffs, it ought to have been disclosed to the defendants, that they were received on board the brig at St. Thomas's, previous to the 22d January, because there was a greater risk of average loss on this article than on colonial produce.

The custom and usage of the French West Indies has been relied on. Merely placing a guard on board a vessel upon her arrival at one of the islands, and receiving her papers, may be considered in the light of a commercial regulation, and may be analogous to a custom house officer being put on board, to prevent the landing of goods; but the administration here taking charge of the vessel and cargo, seizing the papers and sending them to Cape Francois, (the tribunal of adjudication,) thereby obliging the Captain to repair thither to plead his cause, show at least the evident intention of the administration to select part of the cargo for the use of the municipality, if all ideas of confiscation had been relinquished. Surely a representation of all these circumstances would have determined underwriters to exact a higher premium, than in the common case of taking a ship's papers for inspection!

Messrs. Rawle and Wells for the plaintiffs. If after a call for the loss, the defendants demanded and received the premium, they thereby waive all objections to the policy, on the ground of their running no risk. It is the risk run which entitles underwriters to their premium, and in every case, where a policy has been vacated on the ground of the risk not having occurred, except actual fraud, the premium must be returned. It is absurd to suppose, that where a policy has been vaca-

ted, because the object insured existed, the insurers shall retain the premium in order to adjust a supposed loss.

But independent hereof, it is contended, that though the outward bound voyage originally commenced to Marigilante, yet the Captain not being allowed liberty to trade there, it terminated at Guadaloupe, where he disposed of his cargo and received the proceeds on board. From hence the homeward voyage begins. If the outward voyage should be supposed to submit while the brig lay at Port de Paix, and if the cargo there could not be disposed of, at what time would the present policy begin to operate? Or would it never come into operation?

As to the specie, it certainly can make no difference to the underwriters at what port it was received on board, and it has been admitted, that if it could be shown that the property on board the brig at Port de Paix was meant to be insured as the return cargo, the idle ceremony of landing and re-shipping the articles should be dispensed with. Now the plaintiffs knew that the outward bound insurance ceased on the vessel's being forced into Port de Paix. They were informed, on the arrival of Captian M'Evers, that the money, flour and dry goods, were on board the brig at the time of his interview with Captain Town, at the Cape. Under these impressions the policy was open and their chief object was to insure the cash which was particularly mentioned in the policy. Their written instructions to the office were, "insure 12,000 dollars property on board the brig American, at and from Port de Paix," &c. If the wording of the policy is defective, the intention of the parties may be collected herefrom, and it shall control the former expressions. Thus in 1 Atky. 548, the terms "at and from" in a policy were corrected by the label, or minutes of the agreement, where the policy differed from them. The *strictum jus* or *apex juris* is not to be applied to such commercial instruments, but according to the usual course of trade, and for the benefit of the party insured. Park. 43. 1 Burr. 348.

The words "at and from" in a policy have frequently come before courts of justice for construction. Thus "at and from" L'Orient include an embargo laid there, which prevents the voyage. Per Lord Chief Justice Kenyon, 6 Term Rep. 413. At and from Bengal to England, mean the first arrival at Bengal and where such words are used in a policy, first arrival is always implied and understood. Per Lord Chancellor Hardwicke, 1 Atky. 548. When a ship is insured at and from a place, and it arrives at that place, as long as the ship is preparing for the voyage for which it is insured, the insurer is liable; but it is otherwise where all thoughts of the voyage are laid aside. Per

Eundem, 2 Atky. 359. On an insurance from London to Jamaica, generally, the vessel touched for some days at one port in Jamaica, but was lost in coasting the island, before she had delivered all her outward bound cargo ; it was held that the outward risk ended when the ship had moored in any port of the island, and did not continue till she came to the last port of delivery. 1 Bl. Rep. 417. Outward risk on a ship ends 24 hours after its arrival in the first port of the island to which it was destined ; but the outward policy on goods continues until they are landed. Park. 43. *Barrass v. the London assurance company*.

The plaintiffs here have pursued the usual mode of recovery on policies of assurance. They know of no other mode in which the defendants as a corporation could be subjected to payment on their special contract.

As to the concealment alleged, the insured are not bound to communicate what the insurers are bound to know. Where a fact exists of a general political nature, the latter must inform themselves of it. 3 Burr. 1905. The course of trade must govern for the benefit of the insured. 1 Burr. 348. Where the general well known custom on a voyage to China is to take out the sails, &c. and put them on shore in a store-house, and they are thereby accidentally burnt the insurers are liable. *Ib.* 341. Every insurer is presumed to be acquainted with the trade he insures, whether recently established or not. If it be the usage, though only for one year, he is bound to inform himself of it. Doug. 492. Where a ship was condemned in the French admiralty, on the ground of having an English supercargo on board, the court laid down the rule, that if both parties were ignorant of the oppressive French ordinance, on which the condemnation was had, the insurer must bear the loss ; and if he knew of such an edict, it was his duty to inquire whether such a supercargo was on board. Park. 220.

The witnesses have fully established the custom of putting a guard on board both of foreign and French vessels, and taking the vessel's papers, in the French West India islands, for many years past. The administration had declared no intention of selecting any part of the cargo for the use of the government, when M'Evers met with Captain Town at Cape Francois ; on the contrary, Santhonax actually delivered back the papers of the brig to Captain Town on his application to him at the Cape. Considering French manoeuvres as applied to the American trade, it was no more than a prudential step in the Captain to go to the commandant at the Cape in person, and look after the interest of his employers, or as he calls it in his protest, to plead his cause

there. Neither he nor the plaintiffs could possibly divine, that on his return to the port where his brig was, his specie or flour would be put in requisition by the municipality. As far as events had occurred to the captain, or mate, previous to the 1st February, the vessel was strictly within the usual custom of the island, of which the insurers were bound to take notice as the course of trade. The counsel for the plaintiffs also cited the cases of *Pene et al. v. Vanuxem*, and *Same v. Pratt and Kintzing*, as determined in this court last term.

Shippen, C. J. delivered the charge of the court. The assertion of the plaintiffs, that the defendants demanded and received the premium of insurance, after the demand made for the loss, seems to be fully obviated by the defendants' statement.

The words of the policy are explicit and clear in favour of the defendants, if considered merely by themselves, independant of the written instructions or order to make insurance. In the first part of the policy, the voyage is described "at and from *Port de Paix* to Philadelphia, with liberty to touch," &c.; but in the latter part thereof, according to the constant form, it points out what shall be called the risk, and the words there are, (1 Atky. 546) "beginning the adventure on the said lawful goods and merchandizes, from and immediately following the loading thereof on board of said vessel at *Port de Paix*." But the order runs thus: "Insure 12,000 dollars property on board the brig American, at and from *Port de Paix* to Philadelphia. This memorandum shows the intention of the plaintiffs to have been, to insure the articles on board at the time of the receipt of the last intelligence, however injudicious the measure might have been. This will control and explain the expressions in the formal policy, and the mistake of the clerk therein shall be rectified thereby, according to the authority cited. 1 Atky. 547. It appears to have been the capital object of the plaintiffs, to insure the specie then laden in the brig at *Port de Paix*, and they are so mindful thereof, that they insist on the word cash being inserted in the policy. As to the money, it certainly was not material to the insurers where it was shipped, though it might be otherwise as to the flour and dry goods on account of average loss, as they might possibly have suffered in the previous voyage from St. Thomas's. The defendants certainly knew of cash being on board, and also of other merchandize, though they may not have been informed of the articles. The present execption appears to me a technical one, and if there was nothing else in the case, ought not to prevent the recovery of the plaintiffs.

On the head of concealment, it becomes the duty of the jury

to ascertain the facts in the first instance. Hence arises the law. Be it with them therefore to determine, under all the circumstances of the case, whether the events which took place as to the brig at *Port de Paix*, were within the usage and course of trade of the French part of the island of St. Domingo. If they shall be of opinion, that every thing which happened there was consonant to and within the custom, then the want of communication of the particulars received from captain M'Ever, cannot vitiate the policy, because all the cases abundantly prove that the underwriters were bound to inform themselves of such custom. But if they shall be fully persuaded, that other circumstances occurred not warranted by, nor within the custom, they are next to inquire of the materiality of those circumstances with respect to the subject of the present controversy, and whether the communication of those occurrences would have varied the risk in the judgment of the insurers. The verdict must necessarily, as to this last point, depend on the just inferences and conclusions which the jury draw from the whole mass of the testimony. To subject the corporation to a loss, the risk really run, must correspond with the risk understood and intended to be run at the time of their president's subscription of the policy. 3 Burr. 1909.

When the jury were prepared to give their verdict, Mr. Ingersoll on the part of the defendants, excepted to the charge of the court, relative to the insurance on the homeward bound voyage; and said, he would draw up the exception at large, which might be corrected by the judge's notes, if necessary.

Mr. Rawle for the plaintiffs, thought the exception came too late, and that it should have been tendered before the jury left the bar to consider of their verdict.

Per cur. The bill of exceptions may be put in at any time before the jury have given in their verdict. 1 Tri. per Pais. 229. 2 Tidd 578.

The jury found a verdict for the plaintiff, the parties agreeing that the sum should be liquidated amicably.

RESPUBLICA against WILLIAM COBBET.

It is the practice of the court to give a preference to suits on forfeited recognizances. The Chief Justice and Judges of the Supreme Court are justices of the peace ex officio, and have a power to take recognizance of the good behaviour; and such a recognizance taken towards the commonwealth and all the liege people, is good. A libel is cause of forfeiture of such recognizance, and the guilt of the party may be determined in a suit on the *scire facias*, without a previous conviction.

DEBT, on a forfeited recognizance for good behaviour.

When this cause was removed for trial by Mr. M'Kean, the attorney general, Mr. Lewis for the defendant, submitted to the court, whether it should be tried out of its natural order, under the rules of the court.

Mr. Dallas as *amicus curiæ*, stated, that Judge Patterson, in a late case in the District Court of Pennsylvania, determined, that the United States in civil suits were entitled to have their causes first tried.

By the court. There can be no possible doubt on the subject. Our rule of the 5th April 1789, directs, that "if the commonwealth is not interested in the event of a suit, such cause shall not be entitled to a priority in the trial to other actions, although the name of the commonwealth be used as a party thereto." The ground thereof was, that indictments for a forcible entry and detainer, small trespasses and the like, carried on for the prosecution of civil rights, where the public peace had been slightly violated, should receive no preference. The present suit is of a different kind, and the public weal is materially interested herein. Let the jury therefore be sworn.

A summons in debt had issued in this cause, and a declaration had been filed therein. The defendant pleaded performance, &c. The attorney general replied and assigned for breach certain printed publications in a newspaper, called Porcupine's Gazette, from the 24th August 1797, until the 16th November following, with an averment, that the said false, slanderous and malicious words so published by the defendant, were published by him, with intent falsely, slanderously and maliciously to defame the government of the United States, the officers and the good citizens thereof, as well as the government of this commonwealth, his excellency the governor, and others the officers and good citizens thereof, all which the said commonwealth is ready to verify, &c.

Issue was joined hereupon; but it was afterwards agreed, that the plea and replication should be withdrawn, over and the plea of *nil debet* entered, and issue joined thereon, and that the cause should be tried on its merits.

The recognizance was taken by the Honorable Thomas M'Kean, esq., late chief justice, on the 18th August 1797, in 2000 dollars, and Benjamin Davies and Richard North, sureties therein, in 1000 dollars each, "conditioned, that if the above bounden William Cobbet, shall be of good behaviour towards the aforesaid commonwealth, and all the liege people until the next Court of Oyer and Terminer and general Gaol Delivery, to be holden before the justices of the Supreme Court at Philadelphia, for the city and county of Philadelphia, then the said recognizance to be void, otherwise to remain in force."

The next Court of Oyer and Terminer for the county at Philadelphia, was held on the 26th November 1797.

The attorney general read thirty five different malicious, scurilous and abusive publications in the Porcupine's Gazette, mentioned in the replication aforesaid, defaming, ridiculing and reflecting on the general government of the Union, the principles of republican government, the people for adopting those principles, Mr. Thomas Jefferson, Mr. James Monroe, &c., the king of Spain, the French and Spanish nations and ministers thereof, the government of Pennsylvania, and his Excellency Thomas Mifflin, late governor thereof, Drs. Benjamin Franklin and David Rittenhouse, Mr. Alexander James Dallas, and other individuals, the Justices of the peace, board of health, and overseers of the poor for supposed acts of tyranny and neglects of official duty, &c., &c., &c.

Mr. Lewis, for the defendant, after premising, that though, formally this was an action of debt, it was substantially a cause of a criminal nature, proposed three grounds of defence, which he stated as follows:

1. The late chief justice of the state had no power to take a recognizance of good behaviour, in the case of a libel and before conviction.

2. But if he had such power, the present recognizance is not conformable to the statute of 34 Edw. 3, c. 1.

3. The present recognizance has not been forfeited by the defendant, nor has it been regularly pursued.

1. At common law there were conservators of the peace, but their powers only extended to offences, committed within their own view. The first statute which respected justices of the peace, was 1 Edw. 3, but their powers were not extended beyond mere conservators. 3 Burn's Just. (14th edit,) 4, 5, 6. 2 Hawk. 34, § 11. There was no jurisdiction at common law to take a recognizance for the good behaviour. The stat., of 34 Edw. 3, c. 1 gave that power which was confined to justices of the peace. 4 Burn's Just.

269, 270. Whatever may have been the practice of the judges of the Supreme Court, since the last constitution of 1790, that instrument is silent, as to their being justices of the peace, throughout the state; though by article 5 § 29, the president of the courts in each district, and the judges of the Court of Common Pleas in their respective counties, are declared to be justices of the peace, so far as relates to criminal matters. 3 Dall. Laws, Introd., 81. Binding to the good behaviour at the common law might be the consequence of a conviction by verdict, but could not be exercised originally. 4 Burn's Just. 281.

The attorney general and Mr. Ingersoll answered: This first exception will be seen to be totally void of foundation. By the act of assembly of 22d May 1722, "for establishing courts of "judicature," the judges of the Supreme Court were empowered to minister justice to all persons, and exercise the jurisdictions and powers thereby granted, as full and amply to all intents and purposes whatsoever, as the justices of the Court of King's Bench Common Pleas and Exchequer, at Westminster or any any of them, may or can do." Galloway's edit. Pennsylvania Laws, 114, § 13. Miller's edit. Vol. 1, pa. 85. By the 24th sect., of the 2d chapter of the constitution of 1776, "the Supreme Court, shall besides the powers usually exercised, have the powers of a court of Chancery, so far, &c., and such other powers as may be found necessary, by future general assemblies, not inconsistent with this constitution." 1 Dall. Append. 58. By the act of 28th January 1777, § 4, "the judges of the Supreme Court, shall have, use and exercise all the powers, authority and jurisdiction, that by former laws in force have been theretofore used and exercised," &c. 1 Dall. Laws. 723. The 6th section of the 5th article of the constitution of 1790 pursues the old constitution almost *in totidem verbis*. 3 Dall. Laws, Introd., 80. And in the beginning of the schedule thereto, it is declared, that all laws in force, at the time of making the alterations therein, and not inconsistent therewith, shall continue, as if the alterations had not been made. *Ib.* 86. It clearly then follows, that the jurisdiction of the judges of this court is not restrained by the present constitution, and that they have the powers of the justices of the King's Bench, in England. There those justices are sovereign conservators of the peace, &c. 1 Bac. Ab. 592. 2 Com. Dig. 589. 4 Inst. 73. 9 Co. 118. *b.* In the form of a record of conviction of murder, they are styled justices of the peace. 4 Bl. Com. Append. 2. They are *ex officio* general conservators of the peace, throughout the whole kingdom, and may commit all breakers of it, or bind them in recognizances to keep it. 1 Bl. Com. 850. A surety for the peace is

taken by a competent judge of record. Wood's Inst. 421, 422.— Binding to the peace or good behavior, is a species of preventive justice; 4 Bl. Com. 251; and it may be done by any justice of the peace, or those who are *ex officio* conservators of the peace, according to their discretion. *Ib.* 253. And one may be bound to his good behavior, for causes of scandal, *contra bonos mores*. 1 Haw. c. 61, § 2. The justices of the Court of King's Bench are styled the keepers of the morals of the kingdom of England; so are the justices of the Supreme Court as to this state.

It would be strangely anomalous, if the presidents of the districts should be justices of the peace within their respective districts, and that power be denied to the justices of the Supreme Court, whose jurisdiction confessedly pervades the whole state.

By the court. We have no hesitation in saying, that the late chief justice had full power to take the present recognizance of good behavior, in the case of a libel, and before conviction. By the terms of the old provincial act of 1722, the judges of the Supreme Court here, have all the powers of the justices of the Court of King's Bench in England, who clearly are justices of the peace throughout the kingdom *ex officio*. These powers were secured to each of us, by the constitution of 1776, the law of 1777, the new constitution of 1790, and the schedule thereto. The constitution under which we live, is from being silent on the point of jurisdiction, to be exercised by the judges of this court. There was a strong necessity for giving the presidents of the district courts and the associate judges of the Common Pleas, the authority of justices of the peace, by the express words of the constitution, because it was intended that a new power should be superadded to their offices; but that reason does not hold in our case, the members of this court having uniformly exercised the power, near seventy years before.

2. Mr. Lewis for the defendant. The recognizance as taken is not conformable to the words of the statute of 34 Edw. 3, c. 1. There the expressions are, "sufficient surety and mainprize of their good behaviour towards the king and his people," &c., 4 Burn's Just. 270. Here it is expressed, "towards the aforesaid commonwealth and all the liege people," &c.

By the court. We see no want of conformity here; the construction is very plain and evident. Our difficulty rests on the ground, whether a conviction of the defendant in a court of criminal jurisdiction for the libellous publications charged against him, ought not to have preceded the present suit; and we wish to lead the researches of the counsel to this point.

8. Mr Lewis. Regularly, this proceeding should have originated by *scire facias*, and not by a summons in debt. 4 Burn's Just. 267. 1 Haw. 130. Dall. (old edit.) c. 70. But if we have any advantage herein, it has been agreed to waive it. Under the present constitution, (art. 9, § 10. 3 Dall. Laws Introd. 34,) informations can only be filed in certain cases. But the present method of procedure puts all in the power of the judge or justice, who according to his discretion is to determine on the quantum of the recognizance. His discretion, and the indiscretion of the party charged, settles the forfeiture, without the intervention, of a grand jury, to pass between the state and the party. We have been taught to believe, that grand juries are bulwarks and ramparts between the public and the individual; an attempt to deprive the defendant of the benefit of their review of his conduct is indeed a libel on the laws. By the 7th section of the 9th article of the state constitution, "printing presses shall be free to every person who undertakes to examine the proceedings of the legislature or any branch of government, and no law shall be made to restrain the right thereof. Every citizen may freely speak, write and print on any subject, being responsible for the abuse of that liberty. In prosecutions for the publication of papers, investigating the official conduct of officers, or men in a public capacity, for where the matter published is proper for public information, the truth thereof may be given in evidence; and in all indictments for libels, the jury shall have a right to determine the law and the facts under the direction of the court, as in other cases." 3 Dall. Laws Introd. 34. Some special damages must be proved to warrant the inquiry into a libel. The pursuit of a libel in a criminal procedure, is alien to the constitution of England. Letters concerning libels, (ascribed to Ld. Camden,) 23, surety for the good behavior is only good as warranted by the stat. 34 Edw. 3, c. 1. Ib. 25, and this extends only towards the king and his people. One may not be bound over to his good behavior for publications respecting foreign nations, foreigners, or inhabitants of other states. Every one may freely write on public national measures, whether of our own or foreign countries; and in times of general calamity, as during the prevalence of a plague or yellow fever, the system of treatment becomes an important object of discussion, on which every man has a right to express his sentiments. Whether any publication is an abuse of the public liberty, may be inquired into on the presentment of a grand jury, and tried in the usual method by a petit jury; but not by such a mode of procedure as the present, in nature of an infor-

mation, not within the exceptions of the 10th section of the 9th article of the constitution of Pennsylvania.

E contra for the commonwealth. The letters ascribed to *Ld. Camden*, cited for the defendant, were adapted to the heat of the times, and not to the British code of laws. Their intemperance clearly appears from the sentiments read out of page 23, and they ill deserve the name of an authority. It is apprehended that the 10th section of the 9th article of the constitution merely respects informations, in cases wherein corporeal punishment may be the consequence of a conviction. This is merely a civil action, brought in the name of the commonwealth, on a recognizance contended to be forfeited, wherein money only can be recovered.

The common law of England, as modified by our constitution, acts of assembly and local usage, is binding here; and it is insisted that the present mode of procedure is authorized fully thereby. The first inquiry then is, has the defendant forfeited his recognizance?

A recognizance for keeping the peace may be forfeited by any actual violence, or even menace, or by any unlawful action, that either is, or tends to a breach of the peace, or by any offence enumerated before in the 11th chapter of the author's 4th book. 4 *Bl. Com.* 255. In the chapter referred to are forcible entry and detainer. *Ib.* 148. Spreading false news, and false and pretended prophecies. *Ib.* 149. Any thing tending to provoke, or excite others to break the peace, and libels. *Ib.* 150. The sending an abusive private letter to a man, is as much a libel as if it were openly printed, for it equally tends to a breach of the peace. *Ib.* 150. 2 *Brownl.* 151. 12 *Co.* 35. *Hob.* 215. *Poph.* 139. 1 *Hawk.* 195.

A recognizance for the good behavior may be forfeited by all the same means, as one for the security of the peace may be, and also by some others, as for speaking words tending to sedition, &c. *Ib.* 257. Any thing which tends to a breach of the peace is a forfeiture of the recognizance. *Cro. El.* 86. Any written or printed publications, pictures, signs, or the like, which set a man in an odious or ridiculous light, and thereby diminish his reputation, are libels, and every libel has a tendency to break the peace or provoke others to break it. 3 *Bla. Com.* 125. 4 *Bl.*

Com. 150. 1 *Hawk.* 193, 195. 2 *Wils.* 403. 1 *Lev.* 139.

It is then evident, that a recognizance for the good behaviour, or even for the peace, may be forfeited by a subsequent libel, menace, &c. or any matter tending to a breach of the peace. The next inquiry is, what is the regular mode of recovery?

If a recognizance be forfeited in England, it must be estreated into the exchequer, and process issue thereon, in that court. Dall. 277, 286. Here the same is to be estreated into this court. It is objected, that a conviction in a court of criminal jurisdiction of the cause of forfeiture, ought to precede this suit. We ask, what species of indictment could be formed for menace, threats, &c. For many causes of forfeiture, indictments would not lie, and the supposed pre-requisite could not possibly be complied with. The law is not to be reproached for such absurdity, with any degree of justice. The recognizance being broken, becomes forfeited or absolute; and being estreated and sent up to the exchequer, the party and his sureties having now become the king's absolute debtors, are sued for the several sums in which they are respectively bound. 4 Bl. Com. 253.

If a recognizance is given for good behavior, he cannot be indicted for a breach of the recognizance before a *scire facias* upon it, for he may have a plea for his excuse. 5 Com. Dig. 341. 1 Rol. Abr. 900, 1. 5. In a *scire facias* on the forfeiture of a recognizance for breach of the peace, the writ was held good, on a verdict against the defendant, that he had broke the peace, without the words *vi et armis*. 3 Bulst. 220. In Cro. Jac. 598, we find several exceptions by counsel to a *scire facias* on a recognizance for good behavior, but none like the present; and in Rex v. Heyward et al. Cro. Car. 498, the ground on which the defendants obtained a verdict, was that though the principal spoke to a constable words of heat and intemperance, they did not tend to a breach of the peace. M. was bound with sureties for his good behavior; then M. was indicted for that he being so bound, did assault I. S. and so had forfeited his recognizance; the indictment against M. was quashed, because he ought to have been prosecuted by *scire facias* and not by indictment. T. Raym. 196.

In *scire facias* on a recognizance to keep the peace, Ryder, O. J. declared that the question, whether the breach of the peace by assaulting another person, did amount to a forfeiture of the recognizance, might be determined on the plea of not guilty, to the *scire facias*. Sayer 139, 140.

These authorities, it is hoped, will fully remove any doubts which may have arisen in the minds of the court, as to the present mode or procedure. There is no partiality in the case. The same steps have been pursued as to William Duane, the editor of the Aurora.

What hardship occurs here? No forfeiture is incurred until the guilt of the party is ascertained by an impartial trial of his

peers. While strong sensibility is expressed for the offender, let not the case of unoffending and innocent persons be neglected. If the formation of the democratic societies for the purpose of reviewing and censuring the government of the union, is improper, and leads to great abuses, surely the conduct of an alien to our interests and laws is more highly reprehensible, when he attacks in the grossest and most scurrilous manner both public and private measures and characters. His publications are replete with gall and wormwood, without an atom of useful information to the public mind.

To effect the purposes of preventive justice, a discretion must necessarily be lodged with the magistrate. So it was lately under a law of the United States, giving power to the president to remove suspicious aliens. If a justice of the peace exercises his office with wanton cruelty, this court will order an information against him for misconduct in office. If any member of this court should be so unmindful of his high duties as to exact oppressive and tyrannical recognizances, he is subject to impeachment, or a removal from office, on the address of two thirds of each branch of the legislature.

Is the intervention of a grand jury indispensably necessary in all cases, before a party shall be punished for a libel? The learned gentleman who now advocates the defendant's cause, contended with success in the case of *Respub. v. Oswald*, that this court, though the injured and slandered party, might determine on the question of libel without the aid of either a grand or petit jury. 1 Dall. 319.

Shippen, C. J. We entertained doubts at one stage of this cause, respecting the propriety of the present method of recovering this recognizance. Our constitution guards against informations unless in certain excepted cases; and prosecutions for libels in England generally originate by information. We thought there might be oppression in the case of a single justice, with all the checks placed on him by the law, who might take bail in any indefinite sum; and many inconveniences might arise to the sureties, when the principals had gone off and were tried unheard. But we are bound by positive adjudged cases, and must be governed by the law as we find it. If any evils arise, the legislature only are competent to remove them.

The authorities cited by the counsel for the state fully prove, that the guilt of the party may be determined on the *scire facias*, on the recognizance.

The jury in this case have the constitutional right of determining the law and the facts, under the direction of the court

whether the publications of the defendant are libels; and if they view them in the light we do, they will have no hesitation in pronouncing them to be such. Libels are destructive both of public and private happiness, manifestly tend to breaches of the peace, and are good causes of forfeiture of a recognizance to keep the peace or of good behavior. They merit every discouragement, to which they may be legally subjected by a court and jury.

Verdict for the commonwealth.

FRANCIS ANDRE *against* PHILIP CARE.

ETIENNE MALESPINE *against* Same.

XOUX DE SOUCHE *against* Same.

A ship's agent in a foreign port a witness to prove the shippers of the goods. Where French property has been covered in an American bottom, without the knowledge of the captain or his owner, but with the assent of the ship's agent, the party is entitled to the net proceeds of the sales of the property.

THESE suits were brought for the proceeds of certain goods shipped by the plaintiff respectively, at Port de Paix, in the schooner Mary, owned by the defendant, whereof Samuel Casson was commander, who arrived in Philadelphia on the 15th July 1796. The schooner was addressed to the care of Anthony Lamaliere, at Port de Paix; who, not being able to procure a full freight for her back to Philadelphia, obtained sundry sugars and coffee from the plaintiffs on freight, for which the captain gave his receipt. But in order to cover and secure the property, and induce the captain to believe that the same belonged to his owner, the different hogsheads and casks were marked P. C., and this was proved to be the usage of the island of St. Domingo, when French property was intended to be covered in American bottoms.

To prove these different facts, the deposition of Lamaliere, the schooner's agent, was offered in evidence, but the same was objected to by the defendant's counsel. They contended, that though in common cases a factor was a witness, yet here he being responsible to the plaintiffs severally, ought to have had their releases.

The plaintiffs answered: Lamaliere acted as agent of the schooner or owner. He is not even concerned in the question trying, nor can these verdicts be given in evidence either for or against him, in any other suits.

Per cur. A factor or agent is a witness to prove a sale of goods for his principal; (1 Atky. 47. 3 Wils. 40. 3 Term Rep. 27. 3 Dall. 301) even though he is to have for himself what

ever money he can procure for them for himself, beyond a certain sum. 2 H. Bla. 520. A porter, for the sake of trade, may prove the delivery of goods; (Bull. Ni. Pri. 284, 4th ed.) and the ship's agent is surely as little exceptionable as the porter.

The defendant resisted the demands of the plaintiffs, on the ground, that the sugars and coffee had been shipped by one Peter Changeur, who was indebted to him largely, and that he had applied the moneys arising from the sales to the discharge of his own demand. But the facts, on the evidence, appeared to be clearly otherwise.

The counsel for the defendant, then urged, that the plaintiffs were only entitled to the prime cost of the goods, and not to the profits arising on the sales thereof here, the same being covered French property, without the knowledge of the defendant or his captain, which might have subjected the schooner to capture by the British.

By the court. There is no colour for the defendant receiving these profits. The goods were shipped with the knowledge of the schooner's agent, and conformably to the usage of the port. The plaintiffs are entitled to the nett proceeds and interest, at least, from the time of commencing their different actions.

Verdicts for the plaintiffs accordingly.

Messrs. Ingersoll and Du Ponceau, *pro quer.*

Messrs. Rawle and Hallowell, *pro def.*

EDMUND MILNE *against* REMPUBLICAM.

Where one pays money properly chargeable against the state, he is entitled to interest from the time of payment; but in common cases, a demand must be made on the legislature, before they can be charged with interest.

This action was brought in pursuance of an act of assembly authorizing the suit, passed 16th March 1798. (4. St. Laws, 238.)

The plaintiff on the 30th May 1781, bought 75 acres of land, late the property of John Robinson, in Whitpain township, Philadelphia county, for 715*l.* from the agents of confiscated estates, the said John having been declared an attainted traitor. The premises were incumbered with the payment of two small annuities, and certain privileges, under the last wills of the grandfather and father of the said John Robinson, which were not known at the time of the sale.

The plaintiff had made certain payments thereon, and was chargeable for some other sums, and compensation for the whole was sought for in the present suit. The plaintiff's demand on the legislature was made in 1797.

Mr. M. Levy, for the plaintiff. The public agents have been guilty of a default which is imputable to the state. Notice should have been given of these incumbrances, which existed on record; and the commonwealth are subjected equally to the payment of interest, as an individual, from the times the respective sums became due. They make profits by investing the public money in the funded debt of the United States and Pennsylvania bank stock; and where they delay payment of a just debt ought to make compensation. The refusal of interest injures good morals, promotes law suits, and is particularly prejudicial to a commercial country. He relied on the following authorities:—Dougl. 361. 2 Bl. Rep. 761. 3 Wils. 266. 2 Burr. 1008. 7 Term. Rep. 124. 1 Bro. Cha. Rep. 359, 375, 384.

Mr. M'Kean, attorney general for the state, insisted that the plaintiff was not entitled to interest; at least for no longer period than he had made a demand on the legislature. Strictly, he is not entitled to compensation, except for the moneys he has actually paid; but this is not insisted on, where the money clearly appears to be due on the incumbrances. If his claims had been just, he would long ago have been compensated therefor; but he now seeks an advantage, from his own neglect, in not demanding a state debt, which in the case of an individual, would have been barred by the act of limitations.

By the court. The payment of the principal sums does not appear to be disputed. For such sums as the plaintiff has paid and show his receipts, which are properly chargeable against the state, let interest be computed thereon, from the times of the dates respectively. As to the rest, interest is only due from the state, from the time of the demand on the legislature.

Verdict *pro quer.* accordingly, for \$481 ²⁷/₁₀₀

RICHARD SIMPSON lessee of **WILLIAM WILLINCK, NICHOLAS VAN STAPHORST, CHRISTIAN V. ENGHEN, HENDRICK VOLLENHOVER, and RUTGER JEAN SCHIMMELPENNICK** *against* **ROBERT MORRIS and JOHN NICHOLSON.**

Under the act of 8th April 1785, a warrant dated in 1792, shall be preferred to a later one in 1793, though the latter was first delivered to the district surveyor if the same was not actually surveyed when the oldest warrant came to his hand, and the party was ready with his hands and provisions for the survey.

Different constructions of the law of 8th April 1785.

EJECTMENT for 80,000 acres of land, in Lycoming county.

Two suits were brought in one of which the lessors declared as joint-tenants, in the other, as tenants in common. They came on to trial at Williamsport, on the 22d October last, before Shippen Chief Justice and Brackenridge, Justice, when a verdict was found for the defendants, in the Circuit Court.

This was a motion for a new trial, founded on the following facts, which appeared in evidence.

The plaintiff claimed under seventy four warrants, dated 13th and 13th December 1792. Forty of these warrants were dated on the latter day, and numbered 3000 to 3040 inclusive. Thirty two of these issued in the names of Herman Le Roy and John Linkland; and the remaining eight in the names of William Willinck, and the other lessors of the plaintiff, usually called the Holland company.

The defendants claimed under sixty warrants, dated 30th August 1793. Thirty thereof, numbered 4016 to 4045 inclusive, issued in the name of John Nicholson, and the other thirty, numbered 4046 to 4075 inclusive, issued in the name of Robert Morris.

These forty warrants of the Holland company were directed to John Canan, one of the district surveyors, but were not entered in the books of his office. He wrote a letter to John Hanna his assistant or deputy, in these words:—

“Hartslog, 25th July 1793.”

“Mr. Wallis is now at my house, he sets off this day for his camp at Sinnemahoning. He says, there is a large number of warrants directed to me, a number of which will be directed to some of the other districts. As I cannot attend at this time in the district, I hereby authorize you to re-direct such warrants as have been directed to me, as the owners of the said warrants or their agents may from time to time call on you for and generally to represent me in the district when I am absent. Copy of the certificate or direction, you have on the other side. A B having certified to me, that he cannot find land in my district for this warrant to his satisfaction, I

do hereby certify, that it has not been executed in any district.—
As witness my hand the day of, &c. For John Canan. John
Hanna. Then under the surveyor general's direction to the deputy
surveyor, write thus :—To C D execute this warrant, and make re-
turn thereof according to law.

For John Canan.

John Hanna.”

In consequence of this letter, and the power therein contained,
the said John Hanna re-directed these forty warrants in manner
aforesaid, to William P. Brady, the surveyor of the district, No. 5,
in which district the lands in question lie, and delivered them to
Thomas Hamilton, the agent of the Holland company. On the
1st September 1793, Hamilton, tendered them to the said William
P. Brady, who refused to receive them, alleging that they were
illegally directed to him.

On the 4th October 1793, the agent of the company obtained a
regular, formal re-direction of the warrants from the said John Canan
and on the 11th of the same month, again tendered them to Brady;
but he then also denied to receive them, on the ground of his hav-
ing been previously suspended from his office a week before, on
some charge made against him : but he being afterwards acquitted
of the charge and restored to his office, he received the warrants
on the 20th June 1794.

The defendants original warrants lay in the surveyor general's
office undirected, till the 14th November 1793. But John Barron,
a clerk of the surveyor general, having carried up into the country,
notes of them, procured copies of those warrants to be struck off
at a printing press in Northumberland, and directed them in the
name of the surveyor general to the said William P. Brady, and
delivered them to him on the 10th September 1793, at Sunbury,
requiring him to execute them. The two sets of warrants being
thus in the hands of Brady, he afterwards made the surveys of the
lands in controversy, at the joint expense of the lessors of the plain-
tiff and of the defendants, with the mutual assistance of their hands
and stocks of provisions, and declared that the board of property
should determine, who were of right entitled thereto.

The judgment of the board of property, was in favor of the now
defendants. The chief contest before them, was whether the de-
fendants' warrants had regularly issued, before they were directed
by John Barron, at Sunbury. They decided, that the warrants
had been sent to the governor, on the 30th August 1793, and con-
sidered it highly probable, that the sixty warrants were signed and
sealed, before the offices were closed by reason of the yellow fever.

Hereupon the plaintiff brought his ejectments; and on the late trial, three questions occurred.

1. Whether under the act of assembly of 8th April 1785, the posterior warrants of the defendants, being first delivered into the hands of the district surveyor, should take preference of the prior warrants of the plaintiff?

2. Whether the district surveyor could legally authorize his deputy by his letter, to certify that the warrants were not executed in his district, and re-direct the surveys in another district, he never having the warrants in his hands, nor made any entry thereof in his books?

3. The plaintiffs' counsel contended, that the defendants had no legal warrants whatever, because copies were made out before the governor has signed the original warrants, and before the same were sealed.

The judges who tried the cause, gave no decision on either of the points, but reserved the determination thereof to the whole court. It was however agreed by the counsel to submit to the jury, the determination of the single fact, whether the defendants' sixty warrants were signed and sealed, at the time when the supposed copies of them were delivered by Barron to Brady, at Sunbury, on the 10th September 1793. And if such warrants then existed, they were to find for the defendants, but if otherwise, then for the plaintiff.

The jury, after staying out twenty-four hours, found a verdict for the defendants. Hereupon an entry was made in the Circuit Court of a motion for a new trial by the plaintiff, of the same being overruled, and an appeal made to the Supreme Court, and granted, the certificate according to the late act constituting the Circuit Court being considered as filed.

Messrs. E. Tilghman, Duncan and D. Smith, now argued the motion for a new trial, on the part of the plaintiffs. In lieu of the third point, to which they were concluded as to the signing and sealing of the warrants issued to the defendants, by the finding of the jury, they substituted another question, whether the defendant warrants not being registered in the proper office, could authorize the making of surveys thereon?

1. By a law passed on the 21st December 1784, (2 Dall. St. Law 228,) it was declared, that the land office should be opened for applications for lands within the purchase made, or to be made, by the commissioners from the Indians, at the rate of 30¢. per 100 acres, on the 1st May 1785. This was succeeded by the law passed on the 8th April 1785. (Id. 811,) which established a lottery to regulate the preference, which should be given to applications

and the act of 3d April 1792 (3 Dall. St. Laws 209,) afterwards passed, which reduced the price of vacant lands, and directed that actual settlements, pursued in a specified mode, should give a title to certain lands.

The legislature, by their act of 8th April 1785, create three descriptions of warrants; 1st, Lottery warrants, which have been lodged and left with one of the deputy surveyors of the districts, within thirty days after the date thereof, for survey and location within his district.

2d, Lottery warrants, which have not been so lodged or left with a district surveyor, within the said thirty days, but which shall afterwards come to his hands.

3d, Warrants issued on applications to the land office made after the 10th May 1785, in which last class fall the warrants now under consideration.

The preference, as to the first class, is given by section 5, of the act, to those which are lowest in number, in the hands of the deputy surveyor, according to the decision of the lottery.

The second class is declared by the 6th section to be entitled to a priority, but to be posterior to the first. According to the plaintiff's construction of this law, the 8th section thereof, (upon which the difficulty on the first point arises in this cause,) determines their priority by the times of their delivery to the deputy surveyor of the district to whom they are directed.

The priority of the third class of warrants is pointed out in such clear and explicit terms, that it excites surprise how doubts could arise thereon. Towards the close of section 2, it is thus written, and "all applications to the said land office, which shall be made after the expiration of the said ten days, (that is, after the 10th May 1785,) for lands within the said late purchase, being made as above directed, shall have priority according to the order in which they shall severally come to the hands of the said secretary, and shall be numbered accordingly, and not otherwise." And again in § 3, the quantity of land in every warrant specified, is to be surveyed and located according to the tenor of such warrant."

To these plain, unequivocal words, the defendants' counsel oppose a seeming ambiguity in § 8; which run thus:—"All warrants of survey that shall be issued by the said land office of this state, after (and the priority of which shall depend on,) the drawing of the said lottery for lands within the said late purchase, shall be executed in the order, and have preference of survey, as they shall severally be earliest delivered to the deputy surveyor of the district, to whom they be directed, who shall make survey thereupon; and for that purpose the said surveyor general shall register the same

warrants, and every of them, in the order they shall come to his office, in the manner directed in respect to the warrant first aforesaid," &c.

To effect their construction, the defendants are under the necessity of doing violence to the words of the law, either by striking out the whole parenthesis, in this section, by transposing it, or even by metamorphosing the affirmative of the legislature, into a direct negative, and reading it "(and the priority of which shall not depend on)" They not only would render the precise and definite language of the 2d and 3d sections doubtful, but run counter thereto. Where a thing is given or limited by a statute in particular, this by the general words of the statute shall not be taken away; as is held in Foster's case. 11 Co. 56. b.—Cooke and Gray's case. 5 Co. All the words of a statute shall be so construed, as that the whole shall stand together. 1 Jones, 26.

If priority of application, does not give priority of right, as to the third class of warrants, what reason can be assigned for the secretary's dating and numbering the warrants issued after the 10th May 1785? Would it not have been better, to have said at once, that the district surveyor should date the times of his receipt of them, and number them accordingly? But the numbers in the lottery amounted to 570, and that number was pursued by the secretary, as to other warrants.

The legislature in describing lottery warrants towards the end of the 2d section, and in the beginning of the 4th and 5th sections, use the words, "which shall depend on the drawing of the lottery," as synonymous thereto, and leave no room to suppose, that they are to be applied to other warrants, in the parenthesis of the 8th section. If the whole parenthesis is to be rejected, the generality of expression will include all warrants under this priority of delivery, and make it the sole test of preference in all cases; (which will scarcely be advocated,) for no warrants whatever could issue under this law, till the lottery was drawn.

What is to be the rank of lottery warrants of the second description, compared with each other, and with those of the third class, if the 8th section does not apply to them? Is it provided for, under the defendants' construction? Whereas, our literal interpretation assigns a distinct station to all the different classes; and full operation is given to every clause in the law, without absurdity. The first claims priority from their number; the second from their delivery to the deputy surveyor of the district; the third from their date and number. But it is to be understood, that as to all the three classes, the persons entitled thereto, must be ready on the ground, with

their hands and provisions, within a reasonable time to complete their surveys.

But the defendants may contend, that our doctrine is pregnant with inconveniences, and will retard the surveys, and consequent settlement of the vacant lands. If it really be so, and the words of the law are clear and decisive, it is not the province of the court to add to, abridge or alter them. We insist also, that greater inconveniences would attend the adverse doctrine, by making the priority of warrants taken out after the 10th May 1785, to depend—1st. On the the official forms of the surveyor general.—2d. On a proper understanding with the deputy surveyors.—3d. On the fitness of the horses of the applicants:—And 4th. On a proper understanding with the chief clerk, in the office of the surveyor general. Here it is observable, that John Barron, the clerk in a public office, became the indefatigable agent of the defendants, got the printed copies struck off without having the original warrants, directed those copies on the 10th September 1793, to the deputy surveyor of the district, and delivered them to him on the same day at Sunbury. The mere delivery of warrants to deputy surveyors, without applying for surveys, will as much retard the settlement of the country, as keeping them in the pockets of the parties unexecuted; and much more so, if it is not requisite, that they should be registered in the office of the surveyor general.

Again. If the priority of the third class of warrants was to rest on their being lodged in the hands of the deputy surveyors, would not the legislature have made the same provisions as to them, that the offices of the deputies should be kept open within the several districts, and information given thereof, as is directed in the 4th section as to lottery warrants, in order that all persons should be put on one common footing? But no such provisions appear.

The great flood of warrants to be issued after the 10th May 1785, was not contemplated by the legislature, when they enacted the law in question; nor in fact, was it produced, until the act of 3d April 1792, reduced the price of vacant lands to 10% per hundred acres.

By the 7th section of the law of 21st December 1784, warrants issued in pursuance of that act, shall not be confined to any particular place, but shall enable the applicant to get the same located on any vacant land. The rights under indescriptive warrants are as well secured by the act of 8th April 1785, as other warrants, if duly pursued. A warrant which is desired to be located to a particular place, may be superseded by a prior warrant, by § 7. But why so, if the priority depends on the delivery to the deputy surveyor?

He must make the survey, unless a lottery warrant occurs. The bare entry in his books of the receipt of it, can give no information where a survey is desired. The deputy surveyors are not required to keep books specifying their receipt of any other warrants, than those dependent on the lottery.

It is fully admitted, that under former decisions, as well as the equity of the 7th section of the law, if the defendants' warrants had been located and surveyed, prior to the delivery of the warrants of the Holland land company into the hands of the district surveyor, that the defendants would be entitled to a preference, owing to the gross neglect of the prior warrant holders.—But the case here was otherwise. The agents of the Holland land company attended in convenient time on the ground, with their hands and provisions; and the surveys were made at the joint expense of both parties.

2. The certificate of John Canan and the re-direction of the plaintiffs' warrants to the deputy surveyor of district No. 5, were mere formalities. They may be compared to the certificates of justices of the peace, under the law of 1st April 1784, (2 Dall. St. Laws, 202, § 3,) that the lands applied for by warrant were unimproved. But in the case of *Grant's lessee v. Eddy*,* it was resolved by the court, that a warrant for lands in Northumberland county, founded on a certificate of two justices in Luzerne county, was not vitiated thereby. Every thing here was honest and fair; and the sole intention of the legislature was to guard against several surveys on the same warrant. John Canan had another district, wherein he lived. John Hanna was his assistant or deputy, resident within the district to which the warrants were directed. He was recognized and known as the acting officer to make surveys therein. He moreover, received a special appointment to certify and re-direct warrants in the absence of his principal, and was furnished with proper forms for that purpose. He was to do acts merely ministerial, and which required no exercise of the judgment.

Every act which requires an exercise of the judgment, is not a judicial act. A judicial act is supposed to be done, *pendent lite*, of some sort or other. A constable may appoint a deputy to do ministerial acts. 3 Burr. 1262. A deputy possesses the whole power of his principal, and of right acts in his name. A steward *de facto* may receive a surrender; it gives a colour of legal authority; and is sufficient in the case of a mere formality 12 Mod. 466, 470. *Parker v. Kell*. S. C. 1 Salk. 95. 1 Ld Raym. 658. Comy. 84. The recorder sits in the place of the

* *Supra*. Vol. 2, p. 148.

mayor; he acts and is as his deputy. 12 Mod. 690. The act of a deputy *de facto*, as where he acted as deputy's deputy, in the office for three years, though not *de jure*, is good. Cro. El. 534. Judicial acts of necessity, done by and under colour of office, are good. The law favors acts done by one on a reputed authority. 17 699. All judicial acts, done by a bishop *de facto*, as admissions, institutions, certificates and such like, are good; but not such voluntary matters as are injurious to the successor. Cro. Jac. 554. A mayor *de facto*, who has not been duly qualified, may exercise his office by sealing a bond with the common seal, which may bind the corporation. 16 Vin. 114, G. 4, pl. 3. Cites Lutw. 508, 519.

A deputation need not be in writing, but may be by parol. 8 Bac. Abr. 740. The deputation of an office, is in its own nature grantable by parol; and therefore, though it should be granted by writing, yet since it is in itself grantable by parol, it may be revoked by parol. 10 Mod. 74. A deputy high constable may be appointed by parol. 3 Burr. 1260.

The powers of direction and re-direction of warrants in the law, are in the same words. But the surveyor general cannot re-direct a warrant, nor has he any control over his deputy, in this particular, when he has appointed him. The district surveyor therefore as to re-directions, must be considered the principal, with power to make deputations. The execution of a surveyor is more a judicial act in an assistant, than the re-directing of warrants, which follows as a matter of course, in the usual routine of business, on the application of the party entitled to the warrant, where it has not been executed in the district. The construction asserted against the plaintiff would be mischievous indeed, if the deputy district surveyor was not obliged to keep his office open in some known place within his district. Where are the warrantees to look for him? In Philadelphia, Sunbury, or the woods? Is priority of right to depend on casually finding him? It would be too gross a position to say, that the district surveyor, by management, could prefer whom he pleased!

If the chief clerk in the surveyor general's office can direct warrants, at one hundred miles distance therefrom, out of the common course of business, while the warrants remain in the office, why cannot the assistant of the district surveyor, sign certificates and give re-directions, which are mere matters of form? Certainly, the acts of Barron are much more material, than those of Hanna. They were unofficial matters of favoritism, calculated to give the defendants an unfair advantage, in direct contravention of the order established by law.

The supposed insufficiencies in the re-direction of the plaintiffs' warrants, were remedied on the 4th October 1793, and on the 11th they were formally tendered to Brady; but the pretext of suspension from office was then recurred to. The surveyor general may displace a deputy district surveyor, and appoint another in his stead; but he cannot suspend him and leave an office vacant, if it be true that priority of right must be regulated by the priority of delivery of warrants.

So it is, in the cases of the entry of a judgment in the prothonotary's office, or the registering of a mortgage in the recorder's office, the former characters must be deemed the rightful officers; until others are commissioned in their room by the governor of the commonwealth.

8. If the 8th section of the law respects warrants of the third class, (those issued after the 10th May 1785) then a defect occurs, as to the defendants' warrants not being registered in the office of the surveyor general, before they were directed by Barron, which the law requires. There were eighteen districts ascertained, and approved of under the 12th section, and consequently, the same number of deputy surveyors. The registry of warrants would tend to prevent more than one survey to be made on them respectively, and serve as a guide to the surveyor general, and check to his deputies.

It will probably however be styled by our adversaries a mere informality, which shall not vitiate their warrants: but while want of form is urged against the plaintiff, the defendants are obnoxious to the same objection.

Upon the whole matter it is submitted to the court, that the plaintiff was entitled to recover the premises at law on the trial. The Holland Land Company first made application for lands; first paid their money and obtained warrants duly executed; and have used every reasonable effort in their power to obtain an execution of their warrants.

Messrs. Ingersoll and W. Tilghman *e contra* for the defendants.

1. The construction of the plaintiff's counsel of the act of 8th April 1785, renders it inconsistent with itself, and with the general prosperity of the country. In order to secure priority to warrants they must be pursued by early surveys. In the case of indescriptive warrants in particular, they must be duly followed up, by reducing the generality of their expressions, to locations in certain specified places. If their preference depended merely on the times when they issued, all unappropriated lands would

be subjected to their claims, and no posterior warrants could possibly be executed with safety.

The general words of the 2d section, applicable to warrants of the third class are restricted by the terms of section 8. So of the word *tenor* in the 3d section, if the number thereof is supposed to be included therein. The first seven sections will be found on inspection, fully to provide for the priority of lottery warrants. For what purpose then was the 8th section introduced, unless it applies to warrants of the last description? To construe the act literally makes it complete nonsense. Counsel on each side must supply some words; and the introduction of the word *not*, according to our sense of the law, in the parenthesis of the 8th section, makes the sense complete and perfect.

Such freedoms must of necessity be sometimes taken with statutes, and acts of assembly. To refer to a few cases. In 1 Dall. St. Laws 25, the word (*he*) is left out. *Ib.* 71, the word (*and*) is omitted. *Ib.* 416, sec. 2, the words (*any lettery or device*) are omitted. *Ib.* 569, sec. 2, the term "*applied*" is used, instead of "*unapplied*." In 3 Dall. St. Laws 525, the expressions are "*leaving widow nor lawful issue;*" but the word *no* as applied to the widow, has been inserted in the construction of the law. Many other instances might be given were it necessary.

The 9th section of the act enforces our construction: it obliges the deputy surveyor to give a written receipt for every warrant delivered to him, upon request to him made, specifying the day and year when the same was delivered, &c.

2. In some instances, the deputy has all the power of the principal; but he has no power to appoint a deputy unless specially authorized. 16 Vin. Ab. 119. L. 3, pl. 1. Cites Bro. Deputy, pl. 8, who cites 10 Ed. 4, 15. In *Parker v. Kelt*, cited from 1 Salk. 95, and the other books, the patent was to exercise the office by himself or deputy. The certificate and re-direction are confidential acts to be done by the deputy surveyor of the district; the former is to be made in the presence of two witnesses, to guard against all frauds; but not the latter. By the 11th section, the surveyor general appoints his deputy surveyors, and is answerable for them; the deputies give bonds with securities, and take an oath of office, which is to be filed in the office of the clerk of the peace of the proper county. It is evident, that whoever certifies, should have all the district papers in his hands; otherwise, the same warrants might be twice executed, and frauds could not be guarded against. A special trust must be strictly pursued. If

Canan is to be considered as a principal, with reference to certificates and re-directions, then he is empowered as a private person, and not as a deputy, *eo nomine* ; and consequently, he personally must exercise the authority vested in him.

3. The last objection to the defendants' warrants, founded on their want of registry, is at war with the other heads of the plaintiff's argument. The exception pre-supposes, that the 8th section is referable to warrants of the third class, as there is no other clause in the act which requires the registry of warrants. At best however it is but a mere formality, and not essential to the title of the lands. It is more analagous to the determination of the court in Grant's lessee *v.* Eddy, than the assumed power of Hanna. The substantial act, the payment of the money, preceded the issuing of the warrants, which the jury have found to have been regularly signed and sealed, previous to the 10th September 1793, when they were directed. The registry of the warrants afterwards, *nunc pro tunc*, is not comprehensible, being done through invincible necessity. The yellow fever greatly raged in the city, and broke up the public offices. After they were closed, the same necessity compelled the issuing of a number of warrants to James Wilson and Samuel Wallis, esq's. and others, on the 3d October 1793.

The court continued the matter a few days, under advisement, and then proceeded to give their opinions *seriatim*.

Shippen, C. S. This case comes before the court, upon a question of construction of the act of assembly of the 8th April 1785.

The facts are shortly these : Both plaintiffs' and defendants' warrants were issued after the lottery warrants ; the state has been paid for both. The plaintiffs' warrants are earliest in date and number ; the defendants' were first received by the deputy surveyor. The lessors of the plaintiff have however proved, that theirs were first tendered to him ; but, on pretence of their being re-directed by the assistant of the deputy surveyor of another district, and not by the deputy surveyor himself, they were refused to be received. It appears, they were afterwards re-directed by the surveyor himself, but still refused by him, on account of a temporary suspension from his office, but being afterward restored to his office, he received the defendants' warrants. On this case two questions are made : 1st, Whether the 8th section of the act, which gives a preference, from the earliest delivery to the deputy surveyor, respects warrants of this description, namely, warrants issued after the lottery warrants ? And 2dly, If it does respect such warrants, whether the earliest tender of the re-directed warrants did not

bind the deputy surveyor to receive them, although re-directed by the assistant of the first deputy surveyor, and not by himself, he having previously given such assistant an authority in writing to do it? A third question has been made, whether, as the defendants' warrants were not registered in the books of the surveyor general, before the delivery of their warrants to the district surveyor, the defendants can claim title under these warrants, to the exclusion of the plaintiff?

The act is obscurely and incorrectly worded ; but we must endeavour, as well as we can, to discover the plan and real intention of the legislature, taking the several parts of it together. The general meaning of the act is, that the first appliers for lands within ten days after opening the land office, should have their priority determined by lottery, their warrants to be numbered as they come out of the wheel, and all dated on the last day of drawing the lottery. These warrants were to be directed by the surveyor general, to the deputy surveyor of some district, to be executed according to their number. The deputy surveyor was not to execute any of the lottery warrants, till after thirty days from their date ; the last twenty of the thirty days he was to keep his office open for the purpose of receiving these warrants, and make entries of them in a book to be kept for this purpose. After the expiration of the thirty days, the deputy surveyor was to proceed to execute the warrants according to their numbers, giving preference to the lowest number. All warrants not lodged with the deputy surveyor before the expiration of the thirty days, whatever might be their numbers, were to be considered as posterior to the others ; and the act says, shall be surveyed or located accordingly. By which words I understand, that though they loose their priority as to the other lottery warrants, yet they retain priority according to their numbers, as to all warrants issued subsequently to the day of finishing the drawing of the lottery. A provision is made in the 7th section, that a warrant lodged with a deputy surveyor, where the person lodging it fixes upon a particular spot, shall be executed on that spot, unless a person with a prior number shall, before survey, insist on having his warrant laid on the same spot, in which case, such earlier number shall be preferred. Then comes the 8th section, which enacts, that "all warrants that shall be issued by the land office of this state after (and the priority of which shall depend on) the drawing the said lottery, for lands within the said late purchase, shall be executed in the order and have preference of survey, as they shall severally be earliest delivered to the deputy surveyor of the district, to whom they shall be directed, who shall make survey thereupon ; and for that purpose, the said surveyor general

shall register the same warrants in the order they shall come to his office, in the manner directed in respect to the warrant first aforesaid."

The first question then is, to what species of warrants does this section relate? It is contended on one side, that it is meant for the warrants issued after all the lottery warrants are completed; and on the other, it is supposed, that it was intended only for the warrants whose priority was lost, by not being entered with the deputy surveyor within the thirty days; there being, it is said, no other provision made for their execution but by the 8th section. I own, I cannot discover any thing wanting to complete the provisions as to all the lottery warrants. Their priority is early provided for by the numbers drawn in the lottery, and the 7th section completely provides for their execution, by enabling even those who have neglected to lodge their warrants within the thirty days, to lodge them afterwards, and to require the deputy surveyor to survey them according to their numbers, unless prior numbers shall come to his hands before actual surveys made. Those not entered with the deputy surveyor within the thirty days, are indeed postponed to the entered warrants, yet they are directed by the act to be located and surveyed posterior to the others; by which I understand, next after them, according to their numbers, and before the subsequently issued warrants can be located and surveyed. The 8th section is introduced as a general enacting clause, and not by way of proviso, as the two preceding sections are, which respect the execution of the lottery warrants. It expressly contemplates warrants issued after drawing the lottery; and although all the warrants are literally to be issued after drawing the lottery, yet the lottery warrants are to be dated on the last day of drawing it, and unless this expression meant the warrants issued after that day, there was no use or meaning in the expression. For the purpose of having the warrants surveyed according to the time of earliest delivery to the deputy surveyor, it is directed, that the surveyor general shall register the warrants in the order they shall come to his hands, in the manner directed in respect to the warrant first aforesaid. This is a glaring instance of the inaccuracy of the clause; as, instead of the surveyor general's registering the warrants for the purpose of their being surveyed according to their earliest delivery, it must evidently be meant that the deputy surveyor must register them, in the manner directed in the former provision for surveying the lottery warrants.

The priority or preference, as it respects both lottery warrants

and others, can only take place, where two or more warrantees fix upon the same spot of land to be surveyed. The subsequent warrantees seem to stand in need of some provisions for their execution, to avoid much confusion and interference by delay. This is done by the 8th section, giving them a preference from an early delivery of their warrants to the deputy surveyor; which provision does not appear to me at all inconsistent with the priority established for them in the 2d section of the act, if by an equitable construction of the act the 7th section should be extended to them, as well as to the lottery warrants, which in all reason it ought to be; because an earlier number would have the preference to a later one, in every case where they do not apply for the same land; and in that case, though the latter number should come to the surveyor's hands before an earlier one, yet if the earlier number be lodged before an actual survey be made for the latter, the earlier would have the preference. I say, before an actual survey be made, for this obvious reason; that if the preference arising from the prior number should take place after a survey made for another, and at any indefinite time, not only the labor and expense of making an useless survey would be incurred, but it would be an encouragement to men, having earlier unlocating warrants to lie by, and when they found some valuable lands discovered and surveyed by later numbers, to take advantage of their discoveries, and then come forward with their earlier numbers, and call for a survey upon lands they never before thought of. And this was probably one reason with the legislature, for giving a preference of survey from the earliest delivery of the warrant. Another reason doubtless was, to expedite the sale of the lands, and to prefer the watchful to the dormant applicants. If this be the meaning of the legislature as I have understood it, how are we to satisfy or construe the words contained in the parenthesis in the 8th section, consisting of the words ("and the priority of which shall depend on")? I acknowledge, the judiciary should not substitute or omit any words in a statute, without evident necessity, and that is only where the words plainly oppose the general sense and meaning of the legislature. In such a case, the judges have construed "or" "and," and "and" "or," as well in acts of parliament, as in wills, in order to effectuate the intention of the legislature. It is proposed at the bar that we should add the word not in the parenthesis. This would certainly be using great freedom with the expressions of the law; yet, if absolutely necessary to the true construction, it might perhaps be justified. It has however occurred to me, that as other mistakes appear in the law, perhaps the legislature have hastily put the parenthesis in the wrong

place. If the parenthesis had been placed after the words "drawing the lottery," instead of before them, the sense would be more complete, and with a small change in the expression, entirely conformable to the construction I have given to the law. The words would then stand thus : "All warrants that shall be issued by the land office of this state after the drawing the said lottery (and the priority which shall depend thereon)" that is, after such priority, "shall be executed," &c. The reading of the clause in this way would, it is true, be attended with the omission of the word "of" before "which," and the insertion of the word "thereon," instead of the word "on;" which however, would be a less violent departure, than substituting a direct negative for an affirmative proposition; and some construction must be made to reconcile the apparent contradiction in the clause. I have suggested, that the parenthesis might have been hastily inserted in the wrong place. This is more probable, not only from the awkward way in which it stands in the act, but from a circumstance appearing on the Journals of the house. It there appears in the discussion of the act, that the whole 8th section was agreed to by a majority of the house, without any parenthesis, or any word tantamount to it; and no amendment of the section appears to have been made afterwards. It is probable therefore, that it arose from some sudden motion made, when the will was about to pass, and without due consideration inserted where it stands; and this mistake might the more easily pass unnoticed, as the legislature then consisted only of a single branch, and no senate existed to correct the mistake.

If my construction of the act be well founded, it will be unnecessary to enter into the second or third points, made by the counsel on both sides. For whether the certificate and re-direction of the assistant to the deputy surveyor under a power from him be good or not; or whether the registry of the defendants' warrants by the surveyor general was made in time or not, will be immaterial, if we call in aid of our construction on the first point, the 7th section of the act. It appears clearly in the case, that before any survey was made on the defendants' warrants the plaintiffs warrants were actually re-directed with the proper certificate of the deputy surveyor himself, and were earliest in number, and that the surveys were made with the joint assistance of the plaintiffs' and defendants' hands and provisions, and declared by the deputy surveyor to be made for such of the parties, in whose favor the Board of Property should determine; and it will follow from my own principles on the first point, that the determination

of that Board ought to have been in favor of the claim of the Holland land company, and not of the defendants.

I am therefore of opinion, that a new trial should be awarded.

Yeates, J. The 2d section of the act of 8th April 1785, expressly declares, that all applications to the land office made after the 10th May following, shall have priority according to the order, in which they shall severally come to the hands of the secretary, and shall be numbered accordingly and not otherwise. And the 3d section directs, that the deputy surveyor of the district, or the direction of the surveyor general, shall duly execute the warrants, according to the tenor of such warrants. These clauses are free from all doubt and ambiguity; and strong expressions must necessarily be produced to show, that the will of the legislature in these particulars, has been changed. I have not for my part, been able to discover such intention.

I fully agree with the plaintiff's counsel, that the priority of right of the three different descriptions of warrants, as they have classed them, is ascertained by the law. The preference of the first class rests by the 5th sections, on their number; of the second by the 8th section, on their delivery to the deputy surveyor; of the third, by the 2d and 3d sections, on their date and number. The 7th section in my idea, relates to any species of warrants of higher numbers, the locations whereof have been desired at particular places, which are afterwards superseded by lottery warrants (and no others,) of a lower number. Such are the words of the law, independent however, of the positive provisions of any law on the subject, it seems unquestionable, that the not pursuing an early indescriptive warrant with due diligence, by a delivery of such warrant to the deputy surveyor, and application for a survey, will postpone such early warrant to a latter one, followed up by a survey. On any other principles, the appropriation of lands and settlement of the country, would wholly depend on the will or caprice of individuals, possessing early warrants, as to the times when they thought proper to reduce the same to a certainty, by surveys.

But unless the 8th section is referred to lottery warrants, not lodged or left with one of the deputy surveyors, within the thirty days after drawing of the lottery, the priority of such lottery warrants, considered in relation to other warrants of the same class, or to those not dependent on the lottery, remains in my apprehension, unfixed and unsettled. The words descriptive of lottery warrants, in the 2d and 5th sections, are again repeated in the 8th section; and I do not feel myself at liberty to convert the affirmative words of the legislature, into negative

terms. I see no necessity for so doing. The construction under the intestate act, is the strong case relied on by the defendants' counsel; "where the intestate dies, leaving widow, nor lawful issue," does not appear to me to be a parallel case, because there, the insertion of the word "no;" is absolutely necessary to give a meaning to the clause, and the sense of the passage evidently requires it. By the construction, I have adopted all the words of the act, so far as they respect, priority of right under warrants, are carried into full operation, and every string of the instrument renders its full sound. At the same time, I freely admit, that the words "surveyor general," in the beginning of the 8th section, are wholly unintelligible to me, as they are used; and I find myself compelled to read in their room, "deputy surveyor of the district." For I cannot conceive, how the registry of warrants by the surveyor general, in the order they shall come to his office, can subserve the purpose of showing the order and preference of survey of warrants, expressly made to depend on the earliest delivery thereof to the deputy surveyor of the district. But by substituting "deputy surveyor of the district," for "surveyor general," the object of the legislature is fully attained. When such lottery warrants of the second class, are registered in proper books, in due succession, by the deputy surveyor, in the order they shall come to his office, all mistakes are prevented, and frauds guarded against.

Thinking as I do, I deem it superfluous, to decide on the other points, made by the counsel in their argument. But I cannot avoid saying, that the certificate and re-direction by Hanna, was equally as proper and correct, as the direction by Barron, under all the circumstances of the present case. The conduct of the latter, was not sanctified by usage, nor the usual forms of the office of the surveyor general; and therefore could not be considered as the constructive act of the principal. It did not *quadrate* with the spirit of the words, in the close of the 2d section of the act, that "all warrants should be made out in their proper order, as soon as conveniently might be, without any needless delay, and without partiality."

The want of registry of the defendants' warrants, by the surveyor general, cannot affect their claim. I have no hesitation in saying, that the words "surveyor general," have been inserted through mistake.

On the whole, I am of opinion, that a new trial should be granted.

Smith, J. I am of opinion with the plaintiff on the first two

points ; and adverse to him, as to the legality of Barron's direction.

I regard the words of the second section of the law, applicable to warrants taken out after the 10th May 1795, as perspicuous, clear and explicit. Their priority of right depends on their date, as the applications come to the hands of the secretary of the land office. Therefore the most unambiguous expressions are necessary to deprive such warrants of the priority arising from their date. The words of the 8th section are not equally clear and plain ; and though the parenthesis may have been put in the wrong place, yet I do not take it to be the office of judges, to declare, that an express provision is repealed and annulled by subsequent ambiguous expressions in the act.

Supposing, however, the case to be otherwise, I strongly incline to be of opinion, that the re-direction of the warrants of the Holland land company by John Hanna, the assistant of John Canan, was good in law. Canan did not exceed his powers, when he deputed Hanna to sign certificates, and give re-directions. These were acts not judicial in themselves, but merely ministerial.

I also think, that the direction of the defendants' warrants, to the deputy district surveyor, was good in law, and sanctified by the usage of the surveyor general's office. The defendants had paid their money to the state. The land office was shut, and the public business was impeded by the violent fever which prevailed in the city.

On the first point, I have no difficulty whatever, resting on my mind. On the two others, I have stated the strong inclination of my mind, but give no explicit opinion thereupon.

I think, a new trial should be awarded.

Brackenrindge. J. I agree with the chief justice in his general construction of the law of 8th April 1785. But I think, that either the words of the 2d section, as far as they respect the warrants in dispute, or those of the 8th section must fall, being contradictory to each other. The lottery warrants are done with, when we come to the 8th section. Nothing more was to be done with them. Nothing more was needed. I am of opinion, that we must either insert the word " not, " in the parenthesis of that section, or must transpose the parenthesis, in the manner already stated. At the same time, I see no reason for altering the words " surveyor. " The view of the legislature was, that the surveyor general should register the warrants, for the purpose of directing them. Their great object of the 8th section, was to prefer

the diligent warrantees, who first delivered their warrants to the district deputy surveyor.

On the second point, I was induced to think at the trial, that the certificate and re-direction by Hanna, were valid acts, and differed therein from the chief justice. I now think differently, and view it as a special authority given to the district surveyors personally, by the law. It operates as notice, and the deputy surveyors are not to be supposed to know the hand-writing of their different deputies, nor bound to act in pursuance of their several re-directions. Yet I conceive, if Brady had made surveys under that authority, they would have been valid. *Quod fieri non debet factum valet.*

But on the point of Barron's direction, I have no doubts of its illegality. His acts were inofficial, and went beyond the usual forms. The warrants of the defendants were neither in the hands of the surveyor general, nor in his own, but remained in the city.

On this last ground alone, I concur in awarding a new trial.

New trial granted, *per tot cur.*

WILLIAM CRAMOND, JOHN LEAMY and HUGH HOLMES executors of DAVID CAY, who survived ANDREW CLOW *against* THOMAS GIBSON and JOHN GIBSON.

The certificate of counsel on an appeal from the Circuit Court resting on facts not apparent on the record to the Supreme Court; must be made during the sitting of the Circuit Court.

APPEAL from the Circuit Court of Allegheny county.

Mr. Rawle for the defendants, offered to file a certificate, signed by himself this day, that whereas the justices of the Circuit Court of Allegheny county had in October last, ordered a judgment to be entered in this cause, for want of an affidavit of defence under the 20th rule of the Circuit Court, without the consent of the defendants or their attorney, and through the said attorney, in the absence of his clients, was ready and willing to proceed to trial of the merits by jury, he believed that "the same are sufficient in law, to obtain a decision in favor of his clients, and are not made for the purpose of delay;" according to the 4th section of the late law, passed 20th March 1799. (4 St. Laws, 864.

Yeates and Smith Justices, who held the last Circuit Court in Allegheny county, declared, that though they retained no recol-

lection of the particular circumstances of this case, they thought it most highly improbable, that they could have denied the defendants a hearing, or that the facts stated could have happened.

Shippen, C. J. How is this matter to be ascertained? Ought not the certificate to have been given during the Circuit Court, when if any previous misunderstanding had taken place, the same could readily be rectified? Are plaintiffs on obtaining judgments in the Circuit Courts, to wait until the ensuing term in the Supreme Court, until they can be informed, whether the defendants intend to appeal?

Mr. Rawle, *pro def.* The law erecting the Circuit Court, does not direct, when the certificate shall be subscribed by counsel; nor any other rule of the court that we know of. If the party is dissatisfied with the decision of the Circuit Court, he may appeal by the expressions of the law, to the Supreme Court, and obtain from the clerk of the Circuit Court, a record of all the proceedings, and file the same with the prothonotary of the Supreme Court, before the next term; in failure whereof, &c., but no appeal shall be available, unless the counsel for the appellant shall state in writing, his reason for said appeal, certifying, &c. All these pre-requisites have been complied with, and the defendants apprehend they are in due time. Plaintiffs may proceed to execution on their judgments, if certificates are not given and the appeals entered sitting the Circuit Court; but the appeal in such case is in nature of a writ of error, where the execution is begun, and is no supersedeas thereto. This action was removed to the last September term, and by the rules of the Circuit Court, no affidavit of the defence was necessary until the third term. Had it been removed to March term, then the affidavit might have been required at the second term, by the 20th rule of the court. My instructions are, that the Circuit Court directed the entry of the judgment, on the mere ground, that there was no affidavit of defence.

Mr. E. Tilghman for the plaintiffs. I am authorized to assert, that the judgment was taken with the consent of the attorney for the defendants. The entry on the record seems to show this: "judgment for the plaintiff, the debt to be ascertained by the clerk of the Circuit Court."

By the court. The intention of the legislature, and our own views in demanding the certificates of counsel in several instances, by our

rules for regulating the practice, were that improper delays might be obviated, by throwing a personal responsibility on respectable gentlemen of the possession. But that object could never be attained, if the certificates were to depend on mere information of facts, not agreed to by the sitting justices, nor admitted by the adverse counsel, nor within the knowledge of the person subscribing the certificate. Though the law is silent in this particular, we are decisively of opinion, that every appeal, resting upon facts not apparent on the record, should be made, sitting the Circuit Court, and the certificate then signed by counsel. The litigated matters are then fresh in the recollection both of the court and counsel, and can be truly stated. If the counsel differ in their statements, the same may be corrected by the court, according to the real circumstances of the case. The certificate in this instance comes too late and the appeal must be dismissed.

JOHN PHILIPS assignee *against* MATTHEW CLARKSON and EDWARD BONSALL.

A grants lands to B, subject to a yearly rent charge, with right of entry into the premises, to hold until the rent is paid, and B., covenants to pay the yearly rent to A., his heirs and assigns. B., grants the lands to C., subject to the first rent and to a new created rent payable to himself, and conveys the last rent to W., who afterwards becomes entitled to part of the first rent under his father's and mother's wills, no part of the first rent is extinguished hereby.

Case stated for the opinion of the court.

Joseph Morris and wife, on the 3d August 1774, conveyed a lot of ground situate in China street, in the county of Philadelphia, to the defendants, Matthew Clarkson and Edward Bonsall, in fee ; reserving a rent charge thereout of forty dollars per annum. The grantees expressly covenant to pay the said rent charge to the said Joseph Morris, his heirs and assigns forever, on the first day of June yearly, the first year's rent to be paid on the 1st June 1776, (*Prout* deed.) A right of entry was reserved to hold till the rent paid.

The said Joseph Morris and wife, by deed dated the 21st October 1776, convey and assign this rent charge, (*inter alia*,) with the right of entry, &c., to Thomas White, in fee. (*Prout* deed.)

The said Thomas White, being so seized of this rent charge, by a codicil to his will, dated November 6th 1776, devises it to his wife Esther White, his son William White and his daughters Sarah Charlotte White and Mary Morris and their heirs, equally to be divided between them ; but if his daughter Sarah Charlotte dies before him, without issue, her share to be divided between her other sisters and her brother. (*Prout* codicil.) Her sisters were Sophia Hall and the said Mary Morris.

By a second codicil, dated 26th March 1778, the said Thomas White mentions the death of his daughter Sarah Charlotte, and devises the fourth part of the said rent charge to his wife Esther, his son William, and daughters Sophia and Mary in fee. (*Prout* codicil.)

The said Thomas White died, seized of the said rent charge, on the 29th September 1779.

Sophia Hall, widow, one of the devisees aforesaid, on the 30th April 1782, conveys and assigns her share of the said rent charge, and all arrearages to her mother Esther White, in fee simple. (*Prout* deed.)

The said Esther White afterwards made her last will, dated 27th July 1790, wherein she devises the residue of her estate to her son William, and daughter Mary, in fee, as tenants in common. (*Prout* will.)

The said William White and wife, and Robert Morris, and the aforesaid Mary, his wife, by deed, dated 18th December 1795, for a valuable consideration, convey and assign the said rent charge, and all arrearages thereof, with all their right of entry, and other legal means to recover the same, to the plaintiff John Philips, in fee. (*Prout* deed.)

For the arrearages of this rent charge, from the 29th September 1779, till the time of bringing this action, being eighteen years, is the present action brought, on the express covenant of the defendants to pay the same to the said Joseph Morris, his heirs and assigns, forever.

But the defendants contend, that the right of action has been extinguished and cannot revive; because the defendants Matthew Clarkson and wife, and Edward Bonsall and wife, by their deed, dated 20th September 1775, granted the same lot to a certain Morgan Busted, subject to the said rent charge of 40 dollars per annum; payable as aforesaid, and reserving a rent charge of 40 dollars per annum, additional, payable to themselves, in fee. (*Prout* deed.)

And on the 26th June 1779, the said defendants, in consideration of 800*l.* continental currency, equal to 15*l.* specie, conveyed and assigned the same rent charge of 40 dollars, and all their estate, right, title, &c. in the premises, to the before mentioned William White, one of the assignees to the plaintiff, in fee. (*Prout* deed.)

And the said William White remained seized in fee of the said new created rent charge, and also entitled as one of the devisees of the said Thomas White and Esther White, to a right of entry, in case the first rent charge was not paid until the 18th December 1795, when by deed, in consideration nominally of 5*s.*, but the real consideration 1500 dol-

lars, the said William White conveyed the last mentioned rent charge, and all arrearages thereof, to the said John Philips, the plaintiff, in fee.

Mr. Todd, *pro quer.* Unless the plaintiff succeeds in the present form of action he is without remedy. Busteed has died insolvent, and the ground is vacant.

It may be objected, that the whole of the second rent of 40 dollars per annum, became vested in William White by the defendants' conveyance, and that he became entitled to five sixteenth parts of the original rent, under the codicils to his father's will, and to three sixteenths under his mother's will, and that therefore the original rent, or one moiety thereof, is become extinct. It is true, that three months before his father's death he bought in the second rent, with a power of re-entry; but he never was seized of the right of soil, out of which the rent charge issued. On his father's death he held two independent interests in the two species of rents, a claim to the whole of the second rent, resting in himself alone, and a claim to a part of the original rent as a tenant in common. Dr. William White had but a mere right of entry under the defendant's conveyance, which he never executed, nor became the possessor of the lands which belong to the heirs of Busteed, and consequently never became responsible for the original rent. This suit is founded on the express covenant of the defendants to pay to Joseph Morris, his heirs and assigns, the yearly rent charge of 40 dollars. Nothing can be clearer than that an express covenant binds the party in a lease, though the lessee assigns it over. The obligation on such covenant continues, and the lessor shall not be deprived of his action on the covenant to which he trusted, by an act to which he cannot object. 4 Term Rep. 94, 98. It is agreed, that the lord cannot have the land and the rent at the same time; but if the conveyance from the lessee to the lessor be not absolute, but upon condition, as if it were only of a particular estate of shorter duration than the estate which the lessor had in the rent, the union of the tenancy and rent being only temporary, the rent is suspended and not extinguished. 2 Bac. Ab. 448. Tit. extinguishment A. Vaugh. 39, 199. Pollexf. 142. To work an extinguishment of the rent there must be a complete holding of the premises by the lord, as fully as he held the rent. Gilb. on Rents 149, 150. If a re-demise of the premises is made by the tenant to the lessor, he paying a new rent, the old rent continues; and no part of the rent on the first contract shall be suspended; because the tenant has substituted a consideration in the place of the land, which was the

original consideration of the entire rent. *Ib.* 180, 1. 1 Vent. 276. The reason here given will fully control the case before the court.

Mr. Rawle, *pro def.* The plaintiff has made a speculating bargain and must abide by its legal consequences. It is contended, on our part, that as to one half at least of the rent demanded, the same is extinguished on the principle of apportionment, and that the plaintiff is precluded from recovering the other moiety on the ground of circuitry of action.

Dr. William White held the second rent charge for sixteen years absolutely, and during great part of this time had a right of entry at first as to five sixteenths, and afterwards as to one half of the original rent charge. He had an absolute and not a conditional or temporary estate; and the case must be considered as if the defendants had not granted over to Busteed. The grant of the profits of land is a grant of the land itself. Dr. White could make the same entry as to his proportion of the rent, which his father might have made. Coparceners may maintain separate actions for rent, and debt lies on a privity of interest. Now the present suit is founded on the neglect of William White, in not paying the first rent charge. If he could not support this action, neither can the plaintiff; for Dr. White stands in the same situation as the defendants formerly occupied. The latter cannot be supposed to be responsible for the original rents after having re-demised the premises on new rents, and conveying the same and all their interests and rights to one of the proprietors of the first rents. If one have a rent charge issuing out of certain lands to him and his heirs, and purchase any parcel thereof to him and his heirs, the rent charge is extinguished. *Litt.* § 222. But if the father purchase parcel of the tenements charged in fee and die, and this parcel descends to the son who has the rent charge, this charge, shall be apportioned according to the value of the land. *Litt.* § 224.

Again, as to a moiety of the rent demanded, if the defendants should pay the same, they might recover back the amount from Dr. William White, who ought to have procured the payment thereof. This proceeding consequently would be idle and vain. The policy of the law does not permit circuitry of action. 4 Vin. Ab. 532. A having declared on a promissory note against B, made by C to A, and by him indorsed to B, and by him again indorsed to A, and having obtained a verdict, judgment was arrested; because B would be entitled to recover back again from A as the first indorser, the identical sum for which he obtained the verdict. 4 Term Rep. 470.

Yeates, J. delivered the opinion of the court, in the absence of the chief justice. The same party cannot be payer and receiver. Hence arises the law, that when the title to the rent, and the possession of the premises out of which it issues, are united in one person, the former is extinguished. But here the case is different. Dr. William White came in as assignee of the newly created rent, and if he made a re-entry on the premises, could only hold the same until the rents were paid. The property of the ground continued in Busteed and his heirs, subject to the payment of both species of rents. The fallacy of the defendants' reasoning, rests in making the grant of the newly created rent, tantamount, to the re-assignment of the land itself. Dr. White had only a qualified and conditional estate on his re-entry, and in such case, he would be personally responsible only for the period during which he held the ground on privity of estate. The defendants are answerable from their privity of contract; and cannot reasonably complain that their own covenant is enforced against them. According to the case cited and *Kunckle v. Wynick*, (1 Dall. 305,) where the lessee expressly covenants to pay the rent and assigns over, and the lessor accepts rent from the assignee, an action will lie against the lessee for the subsequent rent. The passages cited from Gilbert's treatise on rents, fully establish the plaintiff's right to recover the eighteen years rent in arrear.

Judgment for the plaintiff.

MARCH TERM, 1801.

CORAM, SHIPPEN CHIEF JUSTICE, YEATES, SMITH AND BRACKEN-
RIDGE, JUSTICES.

RESPUBLICA *against* BENJAMIN DAVIS.

In a suit against a surety on a recognizance for the good behavior, the confession of the principal that he had published certain libels may be given in evidence. *Aliter* of the admissions of counsel for the principal, on a former cause; nor can the verdict and judgment in the former cause between different parties be received in evidence against the surety.

Distributing newspapers, containing libellous matter, and the clerk of the printer receiving payment for them, evidence of the publication of the libel.

SUIT in debt on a recognizance for 1000 dollars, conditioned for the good behavior of Willam Cobbet. Plea *nil debet*.

The action against Cobbet, on his recognizance for 2000 dollars, was tried at the last term, and a verdict and judgment were obtained thereon, for the commonwealth.

Mr. M'Kean, attorney general, offered in evidence, the admission of Cobbet's counsel, on the former trial, that he had printed and published the several matters charged against him as libels.

This was objected to, by Mr. Lewis for the defendants, and overruled by the court. The commonwealth may give in evidence in the present suit the declarations or confessions of Cobbet himself, that he was the author or editor of the papers in question. But the admission of counsel in another cause, between different parties, cannot affect the present defendant.

The attorney general then contended, that the verdict against Cobbet and judgment thereon, should be received in evidence. The sole point to be ascertained by the jury, is, whether Cobbet has committed a breach of his recognizance for good behavior. What better testimony can be produced to this end, than to show a recovery against him on his recognizance, after a full hearing on the merits? It is tantamount to a conviction on an indictment for a libel, and the same proofs would be necessary in each case. Where a verdict on an indictment is founded on other evidence besides the party's own oath, there the conviction may be given in evidence by the party injured in a civil suit. Gilb. L. E. 30. This is analogous to principal and accessory in criminal proceedings. Where the accessory is brought to trial, after the conviction of the principal, it is not necessary to enter into a detail of the evidence, on which the conviction was founded. Fost. 365. If to slander, in charging the plaintiff with a felony, a justification be plead, and it be found for the defendant, the verdict amounts to a conviction of the offence.

[Yeates, J. denied this, and said it amounted only to finding of the indictment by the grand jury, (4 Term. Rep. 293,) and was sufficient to put the party accused on his trial.]

A record of a judgment of ouster against two bailiff's under whom the defendant claimed his election, good evidence against him. 2 Stra. 1109. A judgment given against one Leigh, for usurping the office of mayor, was held to be admissible, but not conclusive evidence, against a chief burgess holding under him. 5 Burr. 2598. Wherever a matter comes to be tried in a collateral way, the decree of a court

No evidence was given of the particular repairs done to the ship, except that a gentleman, who was casually at Rotterdam, proved that some painting and wainscoting was done to her there; nor was any protest of the captain shown that he had met with damage at sea.

The ship had sailed from Liverpool to Rotterdam with a cargo on board, whereof the aforesaid Howard was supercargo, and the freight of 525*l.* currency was credited to the defendant, but the time of its receipt by the captain did not appear. On the 18th August 1795, Barclay and Co. wrote to the captain, complaining of his silence to them, and that they had not received his freight, and urging the speedy remittance thereof to them. This letter the Captain received at Rotterdam. The vessel afterwards proceeded to London, where she was sold by the defendant's orders, and the money paid by Captain Foster to the agents there.

It was proved, that the Captain was in indigent circumstances before he was received into the employ of the defendant, and that while he sailed under him, he made three shipments on his own account, the first of about 100 dollars, the second of 40 guineas, and the third of coffee to the value of 1000 dollars. Two of the shipments were afterwards attached by his creditors. On the 21st June 1796, the defendant settled with Captain Foster in Philadelphia, and the balance due to the owner was 25*l.* 4*s.* 5*d.* but the account was so completely and irregularly stated, that it could not be ascertained thereby, how the account stood between them at different periods, and particularly in the latter end of August 1795. The disbursements, &c. of the captain on account of the ship were stated in one general charge of 1770*l.* 12*s.* 2*d.* and the 180*l.* 7*s.* 6*d.* sterling was not credited to the owner.

Mr. Moylan for the defendant insisted, that the most fatal consequences must necessarily arise to the owners of ships, from the general powers contended on the part of the plaintiffs, to be lodged in the masters of vessels abroad. The former, in a circuitous voyage, must be wholly at the mercy of the latter, and frequently be exposed to ruin. If the *Sophia* had needed repairs or provisions those facts were capable of other proof, and much less exceptionable than the testimony of Captain Foster. Perhaps on principles of general policy, on such a case, he would be deemed an incompetent witness, though fortified with a release: at any rate his situation detracts much from his credit. The intercourse between Rotterdam and London is very ready, and furnished the captain with abundant opportunity, during

his long continuance in port, to obtain cash from Barclay and Co. if any necessaries were really wanted for the vessel. The bill of exchange for the money loaned was not presented for an obvious reason, the agents in London being fully conversant of the circumstances of the *Sophia*. The three shipments by the master afford a strong presumption, that part of the money was applied to his private use. Exclusive of the money taken up, he was indebted to his owner, on a settlement, in 25*l.* 4*s.* 5*d.*

It is clear, that the captain can hypothecate his vessel only in case of necessity ; such a necessity as this, that if he did not take up the money, the voyage would be defeated, or at least retarded. 2 Dall. 195. This does not appear to be the case here. Painting and wainscoting the vessel are all the repairs we have heard of, and it was highly unnecessary to borrow money for those purposes in a foreign port. Ship owners must make good the acts of the masters. The master may, if need be, in a strange country, with the advice of his mariners, borrow money on some of the tackle, or sell some of the merchandize, but he cannot make his owners personally liable. 1 Moll. Lib. 2, c. 2, § 14. The persons of the owners, are no ways made liable by the act of the master for moneys taken up in a foreign port. If the master takes up money on bottomry, where there is no occasion, he only is liable ; but it is otherwise, where there is such occasion, though the master misapplies it. 2 Moll. Lib. 2, c. 11, § 11. Beawes Lex Mercat. 98, 99. The master can have no credit abroad, but upon giving security, by hypothecation. 1 Salk. 35. S. C. 2 Ld. Raym. 982. If evident necessity alone, then can justify hypothecation by the master, can he, abroad, bind his owners without such necessity? He surely cannot bind the persons of his owners in a foreign port. 2 Dall. 195. As to the case of *Rich executor v. Coe et al.* Cowp. 636, it respected necessaries furnished in the port of the owners ; and if the observations of Lord Mansfield, (*Ib.* 639,) that “ whoever supplies a ship with necessaries, has a treble security ; 1st. the person of the master, 2d. the specific ship ; 3d. the personal security of the owners, whether they know of the supply or not,” are confined to the case then before the court, they certainly are not law, because the captain cannot bind the vessel in his home port. 2 Wms. 367. Doug. 97. Vide 1 Term Rep. 108. 1 Vez. 155. [To which the counsel for the plaintiffs fully assented.]

The statute of 7 Geo. 2, c. 15, § 1, prevents the captain from binding the owners beyond the value of the vessel, by the embezzlement of himself or mariners.

Messrs. Ingersoll and Franklin, *pro quer.* This is undoubtedly a harsh defence, in the language of Lord Hardwicke. 1 Vez. 154. If my servant breaks my carriage, so that it cannot be made use of, and afterwards procures the coachmaker to repair it, and my family have the benefit of it thus repaired, shall I not be obliged to make the tradesman compensation? When the Sophia, by means of the money advanced by the plaintiffs to pay for necessary repairs, provisions, and seamen's wages, is enabled to arrive at London, and is sold at an enhanced price there, and the defendant receives the benefit thereof, shall he not repay the money thus taken up by his agent and factor at Rotterdam? "If the owner keeps the ship, he keeps her subject to the charge the master has brought upon her. His keeping of the ship is proof of his assent, and so brings him within the rule stated in Sid. 411." Per Buller. 1 Term Rep. 78.

It is freely admitted, that the lender of money to the commander of a ship must, for his own security, ascertain that the vessel needed repairs, and that the owner had no goods on board. This is fully sworn to by Captain Foster here, who has no interest whatever in the cause, and the plaintiffs aboard could have no inducement to act with him collusively. Howard went supercargo to Rotterdam, and must necessarily have known the true state of the vessel, her stock of provisions, &c. It was merely accidental, that any stranger should be found at the trial, who saw the wainscoting and painting performed in Holland. Independent of the release, the master must have accounted with the lenders of the money, or his owner; and it was indifferent to him with whom he could account. Nothing can be inferred from the irregular manner in which the account is stated. But if Foster had money in his hands, would he have called on George Barclay and Co. for such small sums of money as 15*l.* 5*s.*, 20*l.* and 10*l.* 17*s.* 9*d.*, in April, May and June 1795? Or would they in October following have paid him 113*l.*, with all their knowledge of the vessel's circumstances? These different sums are credited to the defendant in the account.

As to the captain's three shipments, the plaintiffs have nothing to do with them; but they may be fairly concluded to have been made on credit, his creditors having attached two of them. If the validity of a master's taking up money on his voyage abroad, is to depend on the state of the accounts between him and his owner, it is impossible for a stranger, who depends on the credit of the vessel or owner for repayment, to be made secure; for he has in the nature of things no safe source of information. But if the money be borrowed for a necessary purpose, though it is afterwards misapplied, the owner having re-

posed more confidence in his captain than the foreigner who lends, ought rather to suffer. The master of a ship buys provisions, sails, &c., and has money from his owners to pay for them, but fails, without paying the money,* the owners are liable to pay in proportion to their respective shares in the ship; and the master of a ship is but a servant to the owners. 2 Vern. 643.

It cannot escape reflection, that when the present money was loaned, the war raged in Holland.

The defendants' counsel has insisted, that though the master may take up money abroad by way of hypothecation in a case of necessity, yet he is not entitled to borrow on the credit of his owners, so as to charge them personally, even if there be an evident occasion. We take the maritime law to be otherwise; and that the master may borrow money in a foreign port in such case of evident necessity, for the benefit of his owners and on their credit, and at the common rate of interest, and thereby make them personally liable; though he cannot subject them to the exorbitant premium of 30 and 40 per cent. on the sum taken up, as he may subject the vessel by way of hypothecation. The latter mode creates no personal liability of the owner. 14 Vin. Ab. 330, pl. 9. A master of a ship having pledged the ship for the expenses, &c., laid out upon her abroad, the master's act was held binding on the owners, by the master of the rolls, after some hesitation. 1 Vez. 443. This case is not fully stated, but it would seem from the objections stated, that common interest was only taken, and that the debt did not depend on the safe arrival of the ship. In the same book, 156, Lord Hardwicke by his reasoning implies, that the act of the master can create an assumpsit in the course of the voyage, between the ship owner and the person who does work on her. In the much disputed case of *Yates v. Hall*, all the judges agree in this opinion. Willes, J., says, the owner shall answer the act of the master generally. If a ship be driven into a foreign port, and a thorough repair become necessary, and the master directs such repair, which amounts to more than the value of the ship, I think in that case the owner would be liable. 1 Term Rep. 75. Ashurst, J. remarks, that Roccus lays it down as a rule, No. 32, that in all cases, owners are bound by the contract of the master. There are only two exceptions to the general rule, one in the case of hypothecation, where credit is given to the ship only, the other in the case of a ransom bill. *Ib.* 76. Buller, J., admits, that the master can bind the owner by contracts made for his benefit, but not beyond the value of the ship and cargo.

* In *Samsun v. Bragington*, 1 Vez. 448, Sir John Strange, master of the rolls, said, this seemed to be a transaction at home.

Ib. 77. And Lord Mansfield says, that as between the captors and the owners, the captain had a power to ransom as far as the value of the ship and cargo. *Ib.* 80.

These authorities are highly respectable ; and there can be no difficulty in pronouncing, that taking up reasonable sums in a foreign port at the usual interest on the master's bills for repairs of the vessel, provisions, &c., where it is absolutely necessary to raise an immediate supply of cash, is much more beneficial to the ship owners, than the hypothecation of their ships, at an extravagant profit to the lenders, depending on the contingency of their safe arrival.

By the court. The first fact to be determined by the jury is, whether there existed a plain evident necessity, obliging the master to borrow money for repairs, provisions, &c., in order that he might prosecute his voyage. The proof on this head depends chiefly on captain Foster, of whose credibility the jury are the exclusive judges. He swears to the ship being detained at Rotterdam by an embargo, and the great need he stood in of money for necessary repairs, provisions, and seamen's wages ; that the 180*l.* 7*s.* 6*d.* sterling was fully expended on the vessel ; and without that sum, he could not have prosecuted his voyage to London. The plaintiffs were bound to see, that the master had absolute occasion for the money for necessary repairs, and that the owner had no goods on board whereby the money might be raised : but if such occasion really existed, it could not be expected that they should inform themselves of the state of the accounts between him and his owner ; because, on this head, all they could collect must necessarily be from the master.

So imperfectly is the settled account stated, that we cannot now conclude how the balance stood on the 31st. August 1795, nor when the freight was paid to the captain, or paid over to George Barclay and Co.

It is worthy of observation, that Foster had a lien on the goods for their freight from Liverpool to Rotterdam, and as the contrary does not appear, we must presume that it was paid in the common course of trade, on the delivery of the cargo. Howard, one of the plaintiffs, was the supercargo, and bound for the payment of the freight. From this peculiar character, it must naturally have occurred to him, when the master applied to him for cash, to inquire what had become of the freight money. The 525*l.* had not been remitted to the defendant's agents in London on the 15th August 1795 ; for of this they complain in their letter. And it would seem strange, either that the cap-

tain should borrow money for repairs, when he had this sum in his hands belonging to his owner; or remit the cash, while he was so greatly in need of specie for his vessel. In this view, the plaintiffs cannot be considered as mere strangers to Foster's transactions.

A maritime question has been made at the bar, that though a master may in case of necessity hypothecate this vessel abroad for repairs, yet that he cannot in such case borrow money on the credit of his owner, and charge them personally thereby.

It must be admitted, that the law formerly was, as is stated by the defendant's counsel; and so we held in 1792, in the case cited. But the late determinations have effected a variation in this particular. The power of the master of a ship to take money on hypothecation for necessities for a ship while she is on the voyage, is said to be highly necessary, and that convenience requires it. Per Ld. Chief Justice Kenyon. 3 Term Rep. 269. The power of stipulating an extraordinary profit to lenders of money in foreign ports, in cases of great need, depending on the event of the vessel's safe arrival, seems well adapted to every exigency. But hypothecations at exorbitant rates of interests are certainly more disadvantageous to ship owners, than borrowing reasonable sums in parts abroad, on the credit of the owners, at the common rate of interest. To charge the owners in the latter mode, the occasion of borrowing should be clear and manifest, and the sums not extravagant, and the transaction to be consistent with the most perfect good faith.

If the *Sophia* was sold in London, at an increased price, on account of the money expended on her in Rotterdam, it is a very equitable consideration on the part of plaintiffs; and yet if the money was advanced on Foster's credit, Crawford was not bound thereby. The case comes before us for decision, very imperfectly in point of proof. Why was not the bill of exchange duly sent forward to London, and offered for payment? It would have led to immediate inquiries which would have determined with certainty, the necessity and occasion of taking up money at Rotterdam. Some suspicion must arise on this head; but let it not weigh more than it deserves. The court will only add, that while juries should entertain a jealousy of ship captains improperly running their owners in debt, in foreign parts, they should not be unmindful of those foreigners, who advance *bona fide*, their money for our merchants abroad, and thus promote our interests as a commercial people.

Verdict for the defendant.

Lessee of MICHAEL JOY, EFFINGHAM LAWRENCE, JOHN FIELD and
NATHANIEL FALCONER *against* PHILIP WAGER.

A supposed bankrupt assigns by apt. words in consideration of 5s., his estate to the commissioners, or the use of his creditors claiming under the commission. The proceedings ail for want of a sufficient petitioning creditor. No interest vests by the assignment.

MOTION to set aside a nonsuit, in an ejectment for two lots of ground in the city of Philadelphia.

The lessors of the plaintiff founded their claim under Christian Wirtz, who was seized of the premises in fee. He assigned all his estate to Matthew Clarkson and others, commissioners named in a commission of bankrupt awarded against him, in consideration of 5s. in trust to collect the outstanding debts, sell his property real and personal, and apply the proceeds thereof to the payment of his debts rateably under the commission.

The commissioners afterwards reciting the proceedings under the commission, grant and convey (as much as in them lay, and they lawfully may,) all his estate, real, personal and mixed, to the lessors of the plaintiff, elected as assignees by the creditors, in trust nevertheless, to and for the use, benefit and advantage of all the creditors of the said Christian Wirtz, who may come in duly and seek relief under the said commission. And the assignees covenated, that they would act under the commission with diligence, and pay the several dividends to the creditors respectively, claiming and proving their debts under the commission.

Previous to the issuing of the commission, on the 22d May 1787, Wirtz conveyed to Philip Wager and Hannah his wife, daughter of the said Wirtz, the two lots of ground in question, without any pecuniary consideration; and afterwards on the 30th June following, conveyed another lot of ground to Dr. Charles Moore, for a valuable consideration, and without notice of my act of bankruptcy.

Christian Wirtz and his son William Wirtz, were partners in trade, and on the 30th March 1787, the creditors executed a release to the said William of all their demands against him, in order to enable him to collect the outstanding debts due to the company, for the use of the creditors.

On an ejectment brought against Theophilus Cossart, the tenant of Dr. Moore for the latter lot of ground, a verdict passed for the defendant, on the ground that the debt of the petitioning creditor had not arisen on a contract subsequent to the passing of the bankrupt act on the 17th September 1785, and this court on argument refused to grant a new trial, in September term 1791. 2 Dall. 126.

Effingham Lawrence brought a suit against Christian Wirtz, surviving partner, (his son William having died insolvent,) in the district court of Pennsylvania, to April term 1792, to which he pleaded in bar the aforesaid release to his son, and that he was a certificated bankrupt, upon which a judgment of *non pros.*, was entered.

On the trial of the present cause, the plaintiff rested on the sufficiency of the deed from Christian Wirtz to the commissioners, and their conveyance to the assignees, independent of any bankruptcy; but the court being of a different opinion, a non-suit was taken, with leave to move to set it aside.

In December term 1799, the motion was made and argued by Messrs. Lewis and E. Tilghman for the plaintiff, and Messrs. Rawle and M'Kean for the defendant.

On the part of the plaintiff, it was contended, that the act for regulation of bankruptcy, passed on the 17th September 1785, vested the whole estate in the commissioners, without any assignment by the bankrupt. 2 Dall. Laws, 370, § 4. The present assignment was executed before the supplement passed on the 15th March 1787, which directs, that unless the bankrupt shall execute a conveyance of all his estate, real, personal and mixed, whatsoever and wheresoever, he shall not be entitled to a certificate of conformity. 2 Dall. Laws, 495, § 5. The assignment in this instance therefore, was merely voluntary on the part of Wirtz, and no law obliged him to make it. The act was deemed beneficial to him at the time, though under existing circumstances, he was falsely thought a bankrupt. The legal and equitable interest in the premises passed by his deed to the commissioners, in consideration of 5s. and apt words, "grant, bargain, sell," are made use of for this purpose. Though the trust is declared to be for the use of the creditors, claiming under the commission, and thereby rendered impracticable, yet the court may properly construe it to enure for the benefit of all the creditors; and there is no greater reason in establishing an unrecorded mortgage, than the present deed, against the party himself. A deed which cannot take effect either as a bargain and sale, release or feoffment, may operate as a covenant to stand seized, *ut res magis valeat quam pereat*. 2 Wils. 22. If sufficient appears in the instrument, to show the intention of the party, it shall take effect, if by law it can, though not according to its proper form. No one shall dispute his solemn deed. Cowp. 600. What difference can be pointed out between that case and the present, except the mere possession? Though a release be void as a common law conveyance, it being to convey a freehold to commence in

future, yet it shall have the effect and operation of a covenant to stand seized to uses. 2 Wils. 75. When the intent is apparent to pass the land by one way or another, there it may be good either way. Shep. Touch. 82, 83. One shall not recover against his own covenant in ejectment. 4 Burr. 8208. Judges are commended for being *astuti* in inventing reasons and means to make acts according to the just intent of the parties, and to avoid wrong and injury, which by rigid rules might be brought out of the act. Hob. 277.

It is said, that only two adversary bankrupt cases have occurred in this state, and that this is one of them. Unless the deed is established, the creditors lose every thing. The proceedings under the commission of bankrupt have been adjudged invalid; and if the creditors sue Wirtz, the release to his son as a copartner defeats the suit, though made for very different purposes. The administering complete justice is the object of all laws and courts; and if deeds cannot operate in one form, they shall operate in that which may effectuate the intention.

The evident intent of this assignment was, that the moneys collected on the sales of the real and personal estate of Christian Wirtz, should go to the benefit of his honest creditors.

The defendant's counsel insisted, that the conveyance made to him was on the most valuable consideration, that of marriage; and it was perfectly conscientious in him to retain the premises. The prosecution of the commission of bankrupt had been very hard and vigorous on Christian Wirtz, and he had been tricked into an acknowledgment of the debt on which the petition was founded. Owing to a radical defect in the proceedings, of there being no sufficient petitioning creditor, the proceeding, under the petition were totally invalid, and could neither minister relief to Wirtz, nor his creditors. The commission and every step under it were mere nullities.

The conveyance by Wirtz to the commissioners contemplated a valid commission of bankrupt. The moneys to be collected on outstanding debts, and to arise on the sales of the property real and personal, are to be applied expressly to the payment of such of the creditors as shall in due time come in and claim under the commission. The deed of the commissioners to the lessors of the plaintiff recites the proceedings under the commission, and they convey what they lawfully may, for the use of the creditors, who are to be relieved under the commission. It is evident, therefore, that the intention of Wirtz the grantor, cannot possibly be carried into execution, and no interest, legal or equitable, can vest under his deed. Here is no defect in point of form, and it

cannot be compared to the cases cited at the bar. Creditors may make an ill use of a commission of bankrupt. It is said by Lord Mansfield, that one issued in a case, where the supposed bankrupt was fairly possessed of 30s. for every pound he was indebted to his creditors.

The court declined giving an immediate decision on the argument, and continued the matter under advisement. They however recommended to the defendants' counsel, that the release given to William Wirtz should be withdrawn, that the creditors might proceed to judgment against Christian Wirtz, and obtain a sale of the property, after which the validity of the sale to the defendant might undergo a legal discussion.

In the present term, the court being pressed for their opinion, and the defendant's counsel urging their inability to withdraw the release of the deceased William Wirtz, the Chief Justice delivered the opinion of the court, that the rule to set aside the nonsuit should be discharged, as well, because the assignment was founded on a supposed bankruptcy, which failed for want of a sufficient petitioning creditor, as that the uses declared therein could not now be carried into execution. The use totally fails.

Lessee of WILLIAM HARRIS and MARY his wife *against* EZEKIEL POTTS
and ELIZABETH SMITH.

Devise of a plantation to E. and her male heir forever, that is to say, her son T. in case he shall live to come to age and enjoy it; but if T. dies before then, then to I. in fee, subject to certain legacies. T. arrives at full age, but died before his mother without issue. Adjudged that E. took an estate for life, and having survived her son, the remainder over to I. was good by way of executory devise.

THE following case was stated for the opinion of the court.

Stephen Hubbert being seized in fee of the premises, made on the 30th December 1761, his last will and testament in writing duly executed, whereby he devised as follows, after directing, that in case the provision made for his father and mother should prove insufficient for their livelihood, the sum of 7l. yearly should be paid them out of the yearly rents and profits of his estate: "Item, I give and bequeath to my cousin John Campbell the sum of 100l., to be paid him when he shall arrive at the age of 21 years. Item, I give and bequeath to his sister Mary Campbell the sum of 25l., to be paid her when she shall arrive at the age of 18 years. Item, I give and bequeath to my sister Mary Richardson the sum of 20l., to be paid her in nine years

hence. Item, I give and bequeath to my cousin Samuel Richardson the sum of 5*l.*, to be paid him when he arrives at the age of 21 years. And in case any of the said children should happen to die before they come to age as aforesaid, then their share to descend to their next heir at law. Item, I give and bequeath to my cousin Thomas Hubbert, my brother's son, the sum of 100*l.*, to be paid him when he shall arrive at the age of 21 years. Item, I give and bequeath to his sister Mary Hubbert, the sum of 25*l.*, when she shall arrive at the age of 18 ; but in case either or both they the said Thomas and Mary Hubbert should die before they arrive to the age as aforesaid, then I will and order my executrix the said share or shares, to retain for her own proper use forever. Item, I give and bequeath all and every the plantation, land and premises, whereon, I now live, to my sister Elizabeth Davis, and to her male heir forever, that is to say, her son Thomas Davis, in case he shall live to come to age as aforesaid, and enjoy it ; but if the said Thomas Davis should die before then, then I will and order all the said estate to descend to my aforementioned cousin John Campbell and his heirs forever, he or they paying to Sidney Davis, my cousin, the sum of 50*l.*, and to my cousin Mary Campbell, the sum of 25*l.* in one year after the said estate shall come into his hands ; and in case he should die without heir as aforesaid, then the said estate to Thomas Hubbert, my brother's son, he paying the two last legacies mentioned to the said Sidney Davis and Mary Campbell, or their heirs in manner aforesaid. Item, I give and bequeath to my sister Elizabeth, all that piece or parcel of land, lately purchased by me of John Boggs, being 35 acres so called, be the same more or less, and to her heirs and assigns forever, together with all and singular my personal estate, she paying and fulfilling all the aforesaid legacies and bequests ; and I do hereby nominate, constitute and appoint my said sister Elizabeth Davis my sole executrix," &c.

The said Stephen Hubbert also made and duly executed on the 31st January 1762, a codicil to his said last will and testament, as follows :

“ Whoever, or either it be, Thomas Davis, or the heirs of his body, John Campbell, or his heirs, Thomas Hubbert, or his heirs, that shall inherit my plantation abovementioned, they shall subject themselves to the payment of the two legacies by me bequeathed to Thomas Hubbert and Mary Hubbert, instead of my sister Elizabeth Davis, and in like manner as she was first ordered to do.”

The said testator died, having never aliened or in any manner trans-

ferred the premises in question, nor having made any alteration in his said last will and testament, or codicil thereto.

Thomas Davis, mentioned in the said will, attained the age of 21 years, and enjoyed the premises mentioned in the declaration till he attained the age of 24 years, when he died without issue on or about the month of July 1774, having first made and executed his last will and testament, bearing date the 17th November 1773, whereby he devised the premises in question to Elizabeth Smith, one of the defendants.

It is agreed, that Elizabeth Davis, mentioned in the will aforesaid, died on the 14th May 1794, and that the real defendant, Elizabeth Smith, is the sole heir at law both of Elizabeth Davis and Thomas Davis; and further, that Thomas Davis was elder than either Thomas Hubbert or Mary Hubbert, the legatees mentioned in the will aforesaid of the said Stephen Hubbert.

Elizabeth Davis, on or about the 19th December 1782, paid to the said Mary Hubbert the sum of 25*l.*, mentioned in the will and codicil of the said Stephen Hubbert.

John Campbell, in the will and codicil mentioned by deed of 10th January 1780, conveyed the premises in the declaration mentioned to Mary Campbell, now the wife of William Harris, one of the lessors of the plaintiff.

And the question to be decided by the court is, whether the plaintiff is entitled to recover the premises, under the statement of facts?

The cause was argued at the last term by Mr. T. Ross for the plaintiff, and Mr. Condry for the defendant; and again this term, by Mr. E. Tilghman for the plaintiff, and Mr. M'Kean for the defendant.

The counsel on the part of the plaintiff insisted, that Elizabeth Davis, the sister of the testator, took an estate for life in the plantation, (the premises in question;) Thomas Davis an estate in fee tail, depending on the double contingency of his living to full age and enjoying the land after the death of his mother; and John Campbell an estate in fee simple, under the events which have happened. All these estates may well stand together, the several devisees being in esse at the times of making the will and the testator's death. Thomas Davis's estate never took effect in possession, as his mother survived him. Independent of the codicil, he would have taken only an estate for life.

It could not have been the intention of the testator to have given the plantation to his sister Elizabeth only during the minority of her son Thomas; she was the primary object of his bounty; he devises to her in fee 35 acres of land, and all his

personal estate, subject to the payment of his legacies. He could not have meant to leave her unprovided for in favor of Thomas Davis, John Campbell or Thomas Hubbert, all of whom might, according to the defendant's construction, have taken in preference to her. The devise was "to his sister Elizabeth Davis and her male heir forever; that is to say, in case he shall live to come to age and enjoy it; but if the said Thomas should die before then, over," &c. The generality of the first expressions, "male heir forever," is restricted by the subsequent words, "that is to say, her son Thomas Davis, in case," &c. Though an estate be given to a daughter and the heirs of her body, which is an estate tail, yet the testator may by other words restrain that estate of inheritance, and confine it to an estate for life only. Cowp. 382. All the words of a will shall be considered, and shall be so moulded and bent as to effectuate the intent of a testator. 2 Burr. 1110. The court are bound to construe technical words in a will in their legal sense; but though such words are used, if there be a manifest expressed intention of the testator that those phrases were adopted in a contrary sense, the intent shall prevail. Doug. 327.

Thomas Davis is prior in point of time to John Campbell, because he is first in limitation, but the latter has a bequest of 100*l.* in the will more than the former. To construe the conjunctive *and* in the clause, in case he shall come to age and enjoy it, as a disjunctive *or*, would narrow down the devise to Elizabeth, which it is presumed was not meant by the testator. Though the argument drawn from the circumstance, that the issue of Thomas Davis might be disinherited under the plaintiff's construction, has no small weight, yet it deserves much consideration, that a different construction goes to destroy an estate devised by the former words of the will according to the last reason given in *Barker v. Suretees*. 2 Stra. 1175. The codicil also obviates this argument, and shows the intention of the testator, that the special heirs should be thereby provided for. Thomas Davis not reaching his full age, or dying before his mother's estate ended, failing issue of his body, John Campbell was to take, charged with the legacies of 75*l.* to Sidney Davis and Mary Campbell, and 125*l.* to Thomas Hubbert and Mary Hubbert. Though these latter legacies became vested in the legatees on their arriving at the respective ages of 21 and 18, yet payment is postponed by the codicil, until the event ascertained who was to succeed to the inheritance. An estate may descend to the heir at law until the contingency happens; and it is immaterial whether Thomas Davis did not take at all, or took the lands subject to be defeated by subsequent events. If Thomas

Davis's taking the lands depended on two contingencies, so also was it provided as to Thomas Hubbert.

The defendant's counsel contended, that Elizabeth Davis took the plantation only during the minority of her son Thomas, and that it vested in him on one contingency, on his arrival at the age of 21. He was more the object of the testator's bounty than John Campbell, because on the succession of the latter, he was to pay the two additional legacies 75*l.* to Sidney Davis and Mary Campbell.

This rule is agreed, that *verba intentioni debent inservire*, and every word and sentence which can receive any reasonable sense, shall be taken into consideration. It is evident on inspection, that the will was drawn by an illiterate person, wholly unacquainted with legal forms.

The devise is "to Elizabeth Davis and her male heir forever; that is to say, her son Thomas Davis, in case he shall live to come to age as aforesaid and enjoy it." He gives to his sister another tract of 35 acres, and the residue of his personal estate, which with the profits of his plantation during the minority of her son, was an adequate provision for her; but to this favored nephew, first in point of limitation, he devises nothing, except the premises in question, chargeable with legacies under his codicil. If his estate was to depend on his surviving his mother, and enjoying the land after he came of age, what advancement does he obtain? If his mother had died during his minority, who would then have taken the plantation?

The testator has plainly shown the bent of his mind; he has described the person who was the object of his bounty, under the character of the male heir of his sister, when he should come of age; and failing that event, unless he should die before then, he contemplates his cousin John Campbell. A devise to the heir of M. may be good as *designatio personæ*, and he may take in the lifetime of M. 2 Bl. Rep. 1010. Devise to the heirs male of J. S. having a son, and testator taking notice that J. S. was then living, such son shall take. 1 Wms. 229. The rule *nemo est hæres viventis* does not apply, where the testator manifestly uses the words heirs or issue as a description of his object, as, to the heirs male of the body of A. now living. 2 Woodes. 202.

The plaintiff relies on this, that Elizabeth Davis took an estate for life by implication; but an express estate is given to her male heir forever, when he shall come of age; but it is settled, that words of implication shall not altar an express estate devised. 1 Wms. 21, 54. No implication, though ever so strong, shall carry

it otherwise. 4 Mod. 142. Cro. El. 15. An express estate devised shall not be diminished by implication, Cro. Car. 185, nor enlarged, unless there be express words. 2. Vern. 427, 451.

Here the devise to Thomas Davis was subjected to the payment of the legacies to Thomas Hubbert and Mary Hubbert. If there be a devise to one, on condition to pay a sum of money, if there be a possibility of loss, though not very probable that devisee may be damnified, it shall be construed a fee, 2 Mod. 26, though the sum be in no wise equal to the value of the land. 1 Equa. Cas. Abr. 176, bl. 9. The legacies to Thomas and Mary Hubbert were payable at their respective ages of 21 and 18, and as it is stated in the case, that Thomas Davis was elder than either of them, he might be subjected to the payment of those sums, without any prospect of reimbursement.

Thomas Davis's estate completely vested on his coming of age ; and the court will never construe a remainder to be contingent, where it can be taken for vested. 3 Term Reb. 489, (note.) But the plaintiff's construction moreover would disinherit the issue of Thomas Davis, in case his mother survived him, and the issue of a devisee is not to be disinherited without express words. Cro. El. 424. His death without issue can make no difference in the construction of this will ; it must be judged of from its words, and the events at the time of the testator's death, not from subsequent circumstances. It cannot be supposed that the testator meant to disinherit the issue of his nephew, if he died before his mother. The expressions "and enjoy it," are only expletive and confirmatory of the uncle's intention, and signify to enjoy it. But the word *and* may be construed *or*. The books furnish a variety of cases on this head. These words are the basis of the plaintiff's claim, but they form no condition precedent ; and the subsequent language, "if the said Thomas Davis should die before then," refers to his death in his minority. Besides "and enjoy it," may be rejected as tautologous and superfluous. "What I have not otherwise disposed of," have been deemed idle words in a will ; and it is no new matter to reject loose words, rather than the intent of a testator should be frustrated. 6 Mod. 112, Hob. 65.

The limitation of the estate to John Campbell is rather a substitution, in the event of the premature death of Thomas Davis in his minority, than a remainder over. If the latter took a vested estate in fee tail under the codicil, the limitation over would be too remote as an executory devise. But it is submitted, that the words of the codicil do not change the fee simple interest vested in Thomas

by the will, into an estate tail. The obvious intent of the codicil so as to exonerate Elizabeth Davis from payment of the legacies devised to Thomas and Mary Hubbert. "Whoever shall inherit the plantation, shall subject themselves to the payment of the two legacies, and in like manner as Elizabeth Davis was first ordered to do." She was to pay them at the several ages of 21 and 18, and the same obligation rested on the person entitled to the inheritance. If those legatees reached those periods of their lives, living Thomas Davis, he must necessarily have been of full age, being elder than either of them, and been bound to pay them, though his mother was in full life; and if either or both of these legatees died before the times of payment, their legacies went over to Elizabeth Davis, and must have been paid to her. It will scarcely be insisted, that in either case, if the mother survived the son. John Campbell could take the plantation, unincumbered with the legacies of 125*l*. and yet this absurdity would certainly follow from the plaintiff's doctrine.

By the court. Elizabeth Davis takes an estate for life only in the plantation in controversy. The superadded words "and to her male heir," are not words of limitation of her estate, but are expressly declared by the testator, to mark out her son Thomas Davis, "in case he shall live to come of age and enjoy it." Those expressions, therefore, are designations of the person, and the cases cited on this head fully prove it. Considering the will and codicil together, Thomas Davis would have taken an estate in fee tail in the premises, on his coming of full age and enjoying the same; and this evidently means, surviving his mother, to whom the lands were devised during her life. The intention of the testator must be collected from all the words he has made use of, rendering to all a reasonable sense. Under the circumstances of this case, the devise over in case of Elizabeth Davis surviving her son, to John Campbell, is good by way of executory devise, but for what estate we decline giving any decision at present, being informed that the same is now in litigation.

Judgment for the plaintiff.

A writ of error was brought hereupon to the High Court of Errors and Appeals, and the same was argued in January 1803, but afterwards the parties compromised the dispute.

MICHAEL DAINTRY *against* FRANCIS JOHNSTON, surety of SHARPE
DELANY.

Scire facias on a recognizance on a writ of error, may issue before the term in which the record is remitted to the Supreme Court, on the affirmance of the judgment in the Court of Errors and Appeals.

MR. M. LEVY proposed a point of practice for the decision of the court. This cause had been removed to the High Court of Errors and Appeals, and the judgment had been there affirmed. The doubt at the bar, was whether a *scire facias* could issue on recognizance, entered into before the taking out of the writ of error, previous to the term in the Supreme Court, to which the record was remitted.

He observed, that under the 17th section of the act of 13th April 1791, (3 Dall Laws, 98) the bail became immediately liable to satisfy the condemnation money together with damages, on the principle failing to prosecute his writ of error with effect, and therefore no further delay should be allowed. Debt may be brought on the recognizance, and it may happen, that the sureties may be leaving the state.

Mr. Lewis for the defendant suggested, that the section alluded to, directed, that "after the judgment should be affirmed or reversed, the record and proceedings should be remitted into the Supreme Court to the end that such further proceedings might be had thereon as well for execution as otherwise, as to justice should appertain." The record and proceedings were carried into another court by the writ of error, and there continued until the remittitur. It will not be said, that an execution could issue on the affirmance of the judgment, until the term in the Supreme Court, when the record was sent back; because there would be nothing whereon to found it. Why should a *scire facias* or action of debt, be then accelerated? All process is supposed to issue by order of the court, and the further proceedings on the affirmance of the judgment are put under the direction of the Supreme Court.

The court (Smith, dissenting) declared their opinion, that the *scire facias* might issue before the record was remitted to the term in the Supreme Court; cases may arise, where an application to the court for remedy, on the affirmance of a judgment, may be necessary. But the purchasing of writs of *scire facias* or *capias* on the recognizance, is the mere act of the party and cannot be considered as the award of the court.

Smith, J. thought that the record not being before the court,

no act could be done until the term arrived in the Supreme Court, to which the record was remitted; and that the words "as otherwise," in the clause, comprehended the present case. He felt himself constrained by the words or the law.

ANNE BARDE and ROBERT A. FARMER, administrators of JOHN LOUIS BARDE, plaintiffs in error *against* JAMES WILSON.

Filing of a declaration in causes submitted to reference, is not indispensably necessary Where defendant has appeared by attorney and judgment is entered against him, it shall be taken to be by confession.

In account render, a general reference may be entered by consent.

Every presumption is in favor of report. *Id certum est quod certum reddi potest.*

A judgment on report of referees, with a stay of execution, until a deed for lands should be filed and approved of by the court, held good on error.

Writ of error to Berks county. The original suit brought in account render to August term 1796, and bail marked in 5000*l*. In December 1796, common bail was ordered by the court. In April 1798, judgment *quod computet*, was entered, and in May following, the matters in variance between the parties, were referred by consent, generally to persons agreed upon. The referees reported, that there was due to Wilson the sum of 12,459*l*. 10*s*. 9*d*. of which 5380*l*. was to be paid according to the conditions of sale of certain lands, being the amount of the purchases made by Barde, the intestate, and the residue in specie; and that on the payment of the said consideration money of 5380*l*. Wilson should perfect a title for the lands agreed to be conveyed to the heirs of Barde. Hereupon a judgment was entered in December term 1798, for the plaintiff below, with stay of execution, until a deed should be produced and filed in court and until the court should adjudge the same to convey a good estate in fee simple in the premises, unto the heirs of Barde. No declaration was filed in the suit.

Mr. Rawle for the plaintiffs in error, took five exceptions to the record, as follow:

1. No declaration appears to have been filed in the cause which is indispensably necessary in all suits brought to judgment.

To this Messrs. Ingersoll and Bird Wilson for the defendant in error, answered, that the ground of filing declarations, was to apprise the defendant of the nature of the plaintiffs' demand, and put him on his defence. In account render, the writ is almost as special as the declaration, and conveys equal notice to the adverse party. But in cases of references, under our defalcation act, it is well known, that declarations are not indispensable, and so it was resolved in this court, in April term 1783. *John Lesh v. Henry*

Gurney. Reports of referees are favored, and not to be set aside on light grounds. 1 Dall. 82. The practice of the state on this subject, operates strongly against this objection.

2. It does not appear by the record, in what manner the judgment *quod computet* was obtained, whether by confession, default, or trial of an issue in fact or in law. Besides a general reference has been entered under the defalcation act, instead of an appointment of auditors at common law.

Ans. The judgment has been entered in the usual mode, and as an attorney appeared for Barde, the defendant below, it will be taken to be entered by confession. It appears, that the parties consented to change the nature of the suit, and substitute a reference of all matters in dispute between them instead of an appointment of auditors, who would be bound to state the account specially. This is an unusual mode of proceeding in this state. The parties have ratified this act, by appearing before the referees, and submitting to them the investigation of their different claims. They have been fully heard; and every presumption will be made in favor of a report under such circumstances.

3. The 5380*l.* the consideration of certain lands sold to Barde, is directed to be paid according to the terms of sale; but these terms do not appear in the report.

Ans. There would be a much stronger ground of exception, if this cause had not been inserted. By the conditions of sale of Mr. Wilson's lands in Berks county all bonds, or notes which he had executed, and which became due at the time of any payment for his lands, were agreed to be taken as cash. Owing to the embarrassed state of his affairs, his paper underwent a rapid depreciation, and purchasers of his lands bought up his bonds, and notes at a very low rate. This advantage was secured to the defendant below by the report. The subject was fully discussed before the referees. The conditions of sale are in writing, and clear and intelligible; and *id certum est, quod certum reddi potest*.

4. The defendant in error is not to complete a title, until he receives the full sum of 5380*l.*

It is very unreasonable that he should sweep away the whole estate of Barde to the prejudice of other creditors in equal degree. The report gave to him an undue advantage, contrary to the evident intent of the act of 19th April, 1794. An award

affecting the interest of strangers, is bad in itself; besides Mr. Wilson would obtain by the port a lien on the lands sold for the general balance of his accounts beyond the sum due for this real property. Equity will never create a lien, which does not arise from the nature of the contract.

Ans. There is no suspicion of an deficiency in the assets of Barde. In such a case the court would exercise their equitable powers. 1 Dall. 364. It is not contended that Wilson's representatives shall have any preference over creditors in equal degree, beyond the 5380l. which are payable in his bonds and notes. As to the sum, the rule is applicable, he who seeks equity, must do equity. Max. in Equ. 1.—1 Cha. Ca. 97. 2 Cha. Ca. 87. And it being stipulated, that the payment of the consideration money should precede the conveyance, there can be no ground of complaint. That sum, is payable in depreciated paper, and there is no lien for the general balance of accounts. The rights of creditors must necessarily be affected by every decision against their debtors.

5. The judgment as entered is a monstrous incongruity. The intestate Barde delegated no power to the court of Common Pleas, to judge of the goodness of his title. A party may assign for error what is for his advantage, if it be against the course of the court; as that plaintiff was not amerced on failing in his suit.

Ans. This exception would have come with much more grace from the adverse party; because the execution is stayed as to plaintiff below, for the whole sum found due, until a complete title is made. Arbitrators may go further than a court of equity. 1 Ves. jr. 369. If any doubt should arise respecting the conveyance, it was left open for discussion, and the court ultimately would determine thereon. This is not novel. In a suit removed from Dauphin county, v. Michael Simpson, the report of referees that a deed should be executed to be approved of by the court, upon the payment of the sum found due, received the sanction of this court.

The court declared their opinion, that the different exceptions which had been taken by the plaintiffs in error, had been fully answered by the adverse counsel, and that they saw no sufficient cause to reverse the judgment.

Judgment affirmed.

ISAAC HAZLEHURST and HENRY SPARKS, executors of HENRY DARRAH *against* ANDREW BAYARD.

D. procures a policy of insurance to be made on a vessel for himself and others concerned in the same, and on a loss his executors recover judgment against the underwriter B. who had before obtained judgment against D. B. is entitled to a set-off, though it should appear that O owned half of the vessel.

This was an appeal from the decision of the Chief Justice on a dispute which came before him in the vacation, respecting a set-off.

The facts were these:—The plaintiff's testator effected a policy of insurance on the schooner *Lydia Gideon Olmstead*, master, for himself, and others interested and concerned in the same which was underwrote by the defendant. The vessel was condemned in a west Indian Court of Admiralty, and a suit brought on the policy, which was submitted to reference.

It appeared before the referees that on the schooner being sold under the decree of the Court of Admiralty, she was bought in by the captain at a low and inadequate price, of which the defendant complained greatly; but the plaintiff insisted that they were not to suffer by any misconduct of this nature in the captain; and of this opinion were the referees, who awarded the sum of 105*l.* 11*s.* 1*d.* to the plaintiff, on which judgment was entered.

The defendant had some years before, in the life-time of Darrah, recovered judgment against him for a considerable sum, and cited the plaintiffs lately in the vacation to show cause why the present sum awarded should not be defaulted out of the unsatisfied judgment; and on hearing, the Chief Justice determined that the set-off should be made.

In support of the appeal, it was now shown that one moiety of the schooner only belonged to the plaintiff's testator, and the other moiety was the *bona fide* property of Gideon Olmstead the captain at the time of the subscription of the policy; and Mr. M. Levy in behalf of the latter, contended that it would be highly unjust to subject his proportion of the sum recovered to a set-off, which as the testator's affairs were much embarrassed, might be wholly lost. The conduct of Darrah or his executors ought not to affect his interests. The insurance was made as much on his account as Darrah's; he is intitled to one half of the damages found, and might have brought a suit in his own name.

Mr Ingersoll for the defendant. If Olmstead was the real owner of one half of the schooner, and had brought a suit in his own name on the policy, our defence would have been fully open, by showing his improper conduct in purchasing the vessel at a great under-value, &c. against every principle of good faith;

but it is now too late to urge this as an objection. The action has been instituted in the names of the executors of Darrah, and has proceeded to judgment; Olmstead has ratified it by his own acts; we were told before the referees, that the misconduct of Olmstead should not prejudice the plaintiffs; and having this matter determined against us, we are again informed, that Olmstead ought not to suffer by the acts to Darrah or his executors.

Yeates, J. delivered the opinion of the court. Circumstanced as this case, we can know no other parties is this suit, than those mentioned in the record. Olmstead intrusted Darrah to make the insurance, and has permitted the suit for the defendant's whole subscription to proceed to judgment, without a claim on his part. It is perfectly well settled, that judgments may be set off against each other, (3 Wils. 396. 2 Bl. Rep. 669,) and we can see no reason why a defalcation should not take place in the present instance.

The decision of the Chief Justice must be confirmed.

JOHN FEREE *against* JOHN MEILY, ROBERT MAXWELL and ADAM REIGART, commissioners of Lancaster county.

Return of the viewers of improved lands taken up by a public road, that the damages resulting to the owner are valued at 45*l.* is radically bad.

The soil of improved lands converted into a public road, is not to be valued and paid out of the county stock.

CERTIORATI to the sessions of Lancaster county.

The following facts appeared on the return of the record. The plaintiff preferred his petition to May sessions 1796, setting forth, that a road for the accommodations of the public had lately been laid out from the village of Strasburg to James Gibbon's mill, on the state road leading from Lancaster to Philadelphia, that it runs through the improved lands of the petitioner 50 perches, and along his line 20 perches, and had been opened of the breadth of 33 feet; that the injuries resulting to him therefore were many, and of a peculiar and very serious kind, arising from the value and nature of the property, and the valuable improvements which it had destroyed. It had caused a good brick stable to be pulled down, a painted board fence, inclosing the garden, to be removed, and part of the garden, which was highly improved, to be converted into the road. It led through the petitioner's orchard, and had destroyed 12 or 15 fruit trees of the best kind, and induced a necessity to make and keep up 120 perches of fence, which would otherwise be of no use to the petitioner. The property through which the road led, being out

lots adjoining the village, it was subject to great inconvenience, by destroying the communication between the several parts of it; and praying the court to appoint six indifferent persons to view and adjudge the value of so much of the improved lands as was taken up by the road, and also the damages sustained by the petitioner, in his improvements, by laying out the road.

Whereupon the court appointed six persons to view and adjudge the value of so much of the improved lands of the petitioner as had been taken up for the said use. And the person so appointed returned to August sessions following, that they had viewed the improved lands of the petitioner taken up by the road, and after maturely considering the premises, had agreed to report, that the damages resulting from the said road to the said John Feree were of the value of 45*l.*, which report on consideration was confirmed by the court.

In November sessions following, the court on argument confirmed the report, and directed that the commissioners of Lancaster county should pay the said 45*l.* to the said John Feree out of the county stock, according to the act of assembly, &c.

In May sessions 1800, the court granted a rule on the commissioners to show cause why an attachment should not be awarded against them for not complying with their former order, which was afterwards made absolute in the same sessions; and all the proceedings were then removed by *certiorari* to this court.

Mr. B. Wilson moved, that the court should confirm the order of sessions. There appeared nothing in the record but what was consonant to the act of 1700. (1 Dall. St. Laws 17, § 2.) The words are, that the men appointed shall "view and adjudge the value of so much of such improved lands as shall be taken up for the use of the said road." They are to value the improved lands, not the mere improvements made on the lands. The expressions have a clear definite meaning. Nor are there any instances wanting of this construction put on the law. In June sessions 1786, Joseph Crawford, guardian of the minor children of Hugh Crawford, petitioned for a valuation of improved lands in Philadelphia county, occupied by a road. The persons appointed valued them at 35*l.* and made report to the September sessions following. In March sessions 1788, a rule was obtained on the commissioners to show cause why an attachment should not issue against them for non-payment of the money; and in December sessions following, the rule was made absolute. In March sessions 1797, persons in the same county

valued lands, occupied by a road in the Northern Liberties, at 100 dollars per acre.

Mr. Ingersoll *é contra*, admitted that there might be two or three cases, wherein improved lands had been valued; but insisted that the point had never been solemnly determined on argument, and that the general received idea of the law had uniformly been, that the improvements only were to be appraised. At all events, the will of the legislature must be pursued, if it can be discovered from their expressions. The law was passed above a century ago, and the state of the country will come in aid of a true construction. Lands were then in little request. The whole country was then open to applications, covered as it was with wood. The late proprietaries uniformly laid out streets in towns, and in every grant of lands made an allowance of six acres in each hundred for roads and highways. In this state of things, the act of 1700 gave power to the sessions to lay out roads or cartways into the public provincial roads, which were to be made "in and through such convenient places as were least to the damage or inconveniency of the neighbors or parties concerned, and least injurious to the settlements thereabouts." Then follows a provision, "that no such road shall be carried through any man's improved lands, but where there is a necessity for the same; and where that appears, the respective county courts shall appoint," &c. Could the legislature then contemplate the payment of the soil of uncultivated lands, occupied by highways? Can any rational ground be assigned why this species of soil, dedicated to the public use, should be paid for, and woodland be unprovided for? The making of compensation in the former case for actual improvements, makes the law equal and consistent with sound reason. Improved land at the time passing the law was most valuable: it was productive. But the trust of the six acres per cent for highways descends *ad infinitum* on the owners of each species of land. It is conceded, that in some instances of persons holding valuable lands near the city, or populous towns, the operation of the law may be hard and severe; but it is well known, that in those cases, woodland bears a much higher value than what has been cleared of the timber. But let the evils attendant on the law be what they may, the legislature only are competent to give relief.

There is also a radical defect on the face of the proceedings. The viewers return, that the damages resulting from the said road to the said John Feree are valued at 45l. What is included in this estimate beyond the value of the land, it is impossible to ascertain. The manner of its wording shows there was something in their

estimate which the viewers did not wish particularly to express.

The court unanimously reversed the proceedings on the last ground. The Chief Justice however, during the argument, said, that the case of owners of valuable grounds near the city or towns, stripped of their property for the public emolument, being hard, he would adopt the construction that the lands should be paid for out of the county stock, as the words of the act were sufficiently comprehensive to warrant such construction. But all the other members of the court held, that the legislature could not at that early day have contemplated a compensation for the soil of improved lands converted into a public road, and that the uniform interpretation of a century had settled the true law. This construction seemed to them to be strongly fortified by a consideration of the proprietary allowance made for roads and highways in all their grants.

Judgment of the sessions reversed.

AT A CIRCUIT COURT, AT LANCASTER, APRIL 1801.

CORAM, YEATES AND BRACKENRIDGE, JUSTICES.

JOHN BAUMAN and REBECCA, his wife, *against* GEORGE ZINN, and
JACOB KIMMEL.

Service of notice of a rule to take depositions on the plaintiff's wife, though a party in the process is not good if she has not acted in the business.

Indebitatus assumpsit, for money had and received.

In this case the desposition of Martin Dubs was offered in evidence, under a general rule to take depositions on ten days notice. The notice was served by the defendant Zinn's wife, on the wife of Bauman, the plaintiff. Bauman was out of the state at the time of the service, and had been absent near a year. His wife never appeared to have had any agency in this business.

The court overruled the deposition. Service of notice on the wife would answer no purpose whatever, though named in the process. The rule should have been specially penned, to have met this case.

Verdict for the plaintiff's.

Mr. C. Smith, *pro quer.*

Mr. Hopkins, *pro def.*

ABRAHAM DEHUFF *against* DOROTHEA TURBETT and JOHN MOORE,
executors of SAMUEL TURBETT.

An executor not a witness in a suit brought against him. A creditor neglecting to sue his principal debtor on the application of a surety, does not thereby discharge the surety.

DEBT on bond. Plea, payment with leave, &c.

Turbett was surety in the obligation for John Wilkes Kittera, esq. conditioned for the payment of 179l. 9s. 10d. on the 1st May 1795, with interest. Four years interest were indorsed, paid on the bond, by Mr. Kittera, who had afterwards taken the benefit of the acts of insolvency.

It was proposed to examine John Moore, one of the defendants, to prove that he had demanded of the plaintiff to put the bond in suit, against Kittera, in the month of October 1797.

The plaintiff relied on the objection against him, that he was a party to the suit, responsible for costs in case the plaintiff succeeded, for his false plea, on a deficiency of assets, and that moreover he might be chargeable in a *devastavit*.

The defendant's counsel insisted, that there was no difficulty

respecting assets, and that they were bare trustees, who may be witnesses relating to lands. Doug. 134. The trustees of a public charity are good witnesses in a suit against themselves, in their corporate capacity. Peake 153. The exception there, was not taken on the ground of interest. If persons in equity are made parties for form, they may be examined, saving just exceptions. 2 Atky. 228. [But not at law, *ib.*] The possibility of a *devastavit* is no exception; it must be an immediate interest which excludes a witness. 3 Term Rep. 27. As to the responsibility for costs, they offered to lodge the amount thereof in court, to be paid over, in case of a verdict for the plaintiff.

By the court. We are bound to follow precedents. The general rule clearly is, that no party can be a witness in the cause. Some few exceptions occur in the books grounded either on the necessity of the case, or when a person is arbitrarily made a defendant, and no evidence given against him. 12 Vin. 26. 1 Vern. 308. 1 Sid. 237. Skin. 673. 2 Haw. 432. In *Field v. Biddle*, this matter was determined on solemn argument, and we see no occasion to alter that resolution. No necessity can be pretended here; the measure was devised by the executors; against them the suit must necessarily be brought. We do not think him a competent witness; but as the defence is conducted on a point altogether new in this state, we recommend to the plaintiff's counsel to agree that Moore may be sworn; and if a verdict should pass for the defendants, and the court should adhere to their present opinion, then a new trial shall be awarded without costs: which was assented to accordingly.

It appeared in evidence that the defendants' testator died in July 1796, and that his executors on the 13th or 14th October 1797, informed the plaintiff, that they apprehended danger from a delay of bringing suit against the principal. He complained that he had not received his interest, and said he would apply to Mr. Kittera when he came to town, and endeavor to get the interest and other sureties; but if he did nothing, he would put the bond in suit. He further said, they might pay the amount, and sue the obligation themselves. They replied, the situation of the testator's affairs prevented it, but they were well pleased with his first proposition.

Several suits brought against Mr. Kittera at subsequent days, appeared to have been paid off; some remained unsatisfied. He was a member of the house of representatives in the general government; congress began to sit on the 13th November 1797, and continued sitting till 16th July 1798. During this period, and

going and returning, he was entitled to his privilege. The summons in this cause issued on the 3d October 1798.

On these facts, it was contended by the defendants counsel, that they were discharged from liability. Turbett became security for the payment of this bond, on the 1st May 1795. The penalty after that time became forfeited. He was surety to a definite and not an indefinite engagement, and it could never have been contemplated by the parties, that he was to be subjected to the payment of the money, unless in the instance of the insolvency of the principal. To call on him to pay the debt, while the debtor was solvent, would be inequitable; to give delay at the expense of the surety, and without consulting him, would be unreasonable; to delay bringing a suit against the principal, when required thereto by the surety, or his representatives, who might have more correct channels of information than the creditor, would be highly unjust. Equity it is said, forms part of our law, and in a variety of instances, chancery principles have been recognized and acted under, in this state. Two late cases appear analogous to the present. In *Nisbet v. Smith et al.* in 1785, a creditor giving the principal debtor further time for payment, was to release the surety. 2 Bro. Cha. Rep. 579. It was there said by Lord Chancellor Thurlow, that a surety may come into equity, and apply for the purpose of compelling the principal debtor for whom he is surety, to pay in the money and deliver him from the obligation. And in *Rees v. Berrington*, Lord Loughborough decreed the same point in 1795, the creditor having taken notes from the principal. 2 Ves. jr. 540. And the chancellor remarks, that where a man is surety at law for the debt of another, payable at a given day, if the obligee defeats the condition of the bond, he discharges the security. If a bond is payable in six months with a surety he does not become bound to answer the payment at twelve months, where it was to be at six. The principle is a legal principle. If an action had been instituted against Mr. Kittera to November term, 1797, agreeably to the requisition of the executors, there is the highest probability, that this debt would have been discharged. Three actions commenced to August term, 1798, have been satisfied. This being a case of security, might also have received a preference. On a counterbond, though the surety is not sued or molested, yet he may bring a bill to compel the principal to pay the debt. 1 Vern. 189. Where a probable injury may happen, chancery will give relief on a bill *quia timet*. 1 Cha. Ca. 223.

For the plaintiff it was urged, that if the doctrine contended for by the adverse party prevailed, it would unhinge the settled opinion

of the country in cases of specialities, and infallibly produce great and serious inconveniences. They had been taught to believe, and the general idea was, that sureties joining in a bond made the debt their own as to the creditor; and put it in his option to sue all or either of the obligors as he pleased, (provided the obligation was several) though he could have but one satisfaction. The sureties have no power to give directions when the bond shall be put in suit, or determine how long they shall continue liable. The defendant's testator is a principal as to the plaintiff. If his acquiescence is of any moment, he acquiesced in the security until the time of his death, fourteen months and upwards from the day of payment; and his property in the hands of his executors became chargeable with the debt. His representatives have no reasonable ground of complaint. The plaintiff was willing to assign to them the obligation, on their paying the amount, and this he was not bound to do by the laws of England. A surety in a bond there cannot insist on the assignment of it, upon his discharging the same. 1 Vez. 339. Surety co-obligor may pay the obligation, and then bring case against his principal. 2 Vez. 570.

The two late cases cited by the defendants' counsel, it must be confessed, go beyond the ancient precedents in equity. In *Heath v. Percival*, 1 Wm. 682, A and B, partners in trade, were bound in a bond to C. They broke off the partnership and divided the stock, and A undertaking to pay the company debts, public notice was given thereof, that the creditors might receive their demands. Though C knew of this, and agreed to wait on receiving 1 per cent. additional interest from A, yet he proving bankrupt, C recovered his demand against the estate of the other obligor, at so remote a period as 27 years from the creation of the debt. In 2 Vez. jr. 542, it is said, that a defendant cannot aver at law, that he was surety in the bond; it is the form of the security which forces the party into equity. How far under our local circumstances the authority of the two late cases relied on will be recognized by the court, must be submitted to their judgment.

The court gave it in charge to the jury, that if the true meaning of the parties was, that reasonable time should be allowed for an application to Mr. Kittera, to procure the interest and other sureties, then they must judge whether the period which had elapsed from the time of the defendants' requisition, until his privilege commenced as a member of congress, was unreasonable or not. No evidence has been given when he returned home, or what communication was had with him. If the suit

had been brought to November term 1897, it is at least dubious whether any part of the money would have been recovered; for the judgment might have been delayed by a removal into this court.

But it has been contended, that whether the money could have been got or not by an immediate suit against the principal, the present defendants are discharged.

It is obvious that this doctrine cannot be correct in all cases, particularly in those of strong probable insolvency. Unless an indemnity is offered, the creditor might be subjected to the payment of costs.

Great reliance has been placed on the cases of *Nisbet v. Smith* and *Rees v. Berrington*. Adjudications in England since the revolution, are not equally authoritative with those determined before that era, until the judiciary here have decided on them, and are fully satisfied that they are applicable to our local situation.

We think that the general idea of the liability of sureties in a bond in this commonwealth, has been justly stated by the plaintiff's counsel; but, we are by no means prepared to say, that the conduct of the obligee can, under no given circumstances, absolve sureties, or even that the result of our decision in similar cases to those cited, would not have corresponded with the Chancellor's decrees; though certainly not for the reasons furnished to us. In *Nisbet v. Smith*, three years further time was given by the creditor, contrary to the express direction of the surety: and it is there said, that a surety, generally speaking, may come into equity, and apply for the purpose of compelling the principal debtor for whom he is surety to pay in the money and deliver him from the obligation; and that the obligee had done that very thing which the court would have compelled him to have done, namely, to bring his action. 2 Bro. Cha. Rep. 582. In *Rees v. Berrington* it is also said, that a surety has a right, if the bond is not put in suit, to call upon the holder of it to enforce payment. In that case, two successive sets of notes were accepted by the obligee from the principal debtors giving them further time, without any communication with the surety, who afterwards without notice paid over to the obligors 3000*l.*, instead of paying the balance of 2400*l.* to the obligee. 2 Ves. jr. 540, 541. But what species of suit could Turbett or his executors, amongst us, have brought against Dehuff to compel him to bring his action against Kittera? Or what suit could they bring against the latter to oblige him to pay the debt? They must have waited until they paid the money, as there was

no counter bond. 2 Vez. 570. The decrees in those instances pursued the effect of bills brought by sureties for relief.

But though by the terms of the constitution, (Art. 5. § 6) the Supreme Court, had "besides the powers theretofore usually exercised by them," the powers of a Court of Chancery to perpetuate testimony, obtaining evidence from abroad, and the case of persons *non compotes mentis*, yet they are restricted thereby. A different conformation of the judicial authority necessarily produces different effects. Thus, in England, a third mortgage may buy in the first incumbrance to protect his own mortgage, if he had no notice when he lent the money, and shall hold in exclusion of the second. But it is remarked by Lord Chancellor Hardwicke, that this could happen in no other country, because the jurisdiction of law and equity is administered in England in different courts, and creates different kinds of rights in estates. 2 Vez. 573, 574. The rule in chancery is, where one has law and equity with him, chancery will not interfere in favor of a mere equity. But if this had happened in any other country, it could never have been made a question, for *qui prior est tempore, potior est jure*.

So formerly oyer of a deed was not dispensed with, though shown to be lost; (2 Stra. 1186, 1 Wils. 16, 1 Atky. 845;) and in this government, we have known many honest debts lost by a rigid adherence to this rule of law. The case of read v. Brookman (3 Term Rep. 151; see the case of law v. East India company, 4 Ves. jr. 824,) occurred in 1789, in B. R., and since that resolution, a deed may be now pleaded as lost by time or accident.

Upon the whole, sitting as a court of law, we cannot say, that a creditor neglecting to sue his principal debtor, on the requisition of his surety, thereby discharges his surety in general; and we think it will require great consideration before such a rule is adopted.

Verdict, *pro quer.* for 211l. 7s.

Mr. C. Smith, *pro quer.*

Messrs. M'Kean and Hopkins, *pro def.*

Lessee of GEORGE JENKINS against JOHN STOUTER and DAVID JENKINS.

Devise of lands to three sons in fee, but if either of them die without children, then the same to be equally divided among the other children, or to be sold and the money divided among them, and executors appointed in trust for the purposes and intents in the will, and overseers appointed to see it well performed; on the death of one of the sons without children, the surviving executors may sell the lands devised to him.

EJECTMENT for lands in Caernarvon township.

John Jenkins being seized of the premises in fee, made his last will bearing date the 25th August 1774, wherein he devised a certain tract of land to his son John in fee, paying 200*l.* to two of his brothers; and to his son Isaac the lands in question in fee, paying 150*l.* to a brother and sister; and to his son Joseph other lands in fee. Then follows this clause; "it is also my will, that if any, or either of my sons, John, Isaac or Joseph, die, having no child or children lawfully begotten, that after the decease of such son or sons, the land I have given to him or them, be equally divided among all my other children or their heirs, or to be sold and the money divided among them, as aforesaid." He further appoints his sons, John, Isaac and Joseph, sole executors of his will, "in trust for the purposes and intents in his will contained," and Jacob Morgan, esq. and Robert Clemor, overseers of his "will to take care and see it well performed, according to its true intent and meaning."

The testator had six sons and one daughter, all of full age at the time of making his will. One of the sons, George, died in his father's life-time, leaving issue a daughter. Isaac, the devisee, died intestate, without wife or children. The lessor of the plaintiff claims one sixth part of the lands devised to Isaac, as the only child of William, one of his brothers.

The overseers of the testator's will, by a written instrument, dated 23d May 1783, approve of the surviving executors selling the lands devised to Isaac, and were of opinion, that the money arising therefrom should be divided into six equal shares.

In February term 1790, an amicable action was entered by the lessor of the plaintiff by his guardian, Isaac Jenkins, against the surviving executors of his grandfather, which was referred by consent; and in May term following, the referees reported to the Court of Common Pleas, that the lands devised to Isaac could not be divided without the greatest injury; that they should be exposed to sale, and the money be equally divided amongst the surviving children of their representatives, which was confirmed by consent.

On the 1st June 1790, the lands were accordingly put up at public vendue, and sold to David Jenkins, (the father of David Jenkins, one of the defendants, to whom the same were devised,) and the

surviving executors conveyed the same to him by deed, dated 8th April 1791.

The plaintiff's counsel contested the authority of the surviving executors to sell under the terms of the will, it not being expressed therein who were to sell.

The court declared their opinion, that the law authorities fully warranted the sale. (2 Leon. 220. 1 Cha. Ca. 176. 2 Dall. 223. Sav. 72. Dy. 371. b.) No doubt can arise on the testator's intention, as expressed. The lands were to be divided on the contingency happening, or to be sold, and the money divided among the children. The executors were appointed in trust for the purposes and intents in his will, and the overseers were to take care to see it well performed, according to its true intent and meaning. All concurred in the act, and the sale must be considered as legal, without resorting to the proceedings in the Court of Common Pleas.

The plaintiff's counsel took a bill of exceptions hereon, without arguing the point.

The fairness of the sale was also contested, and a number of witnesses examined, but the jury readily found a verdict for the defendants.

Messrs. Ingersoll and Montgomery, *pro quer.*

Messrs. Dallas and Hopkins, *pro def.*

AT A CIRCUIT COURT, AT YORK, APRIL, 1801.

CORAM, YEATES AND BRACKENRIDGE JUSTICES.

Lessee of JACOB KOLB *against* JOHN KOMP.

Though a posthumous child be entitled to a share of his father's lands as if he had died, intestate, yet if there be a deficiency of personal estate to pay the debts, he shall not recover against a purchaser under the executors, until he has paid or tendered his proportion of such deficiency : but if partition cannot be made of the lands, they remain liable for the sum justly due to such child.

EJECTMENT for one messuage, &c. and 112 acres of land in Dover township. The lessor of the plaintiff claimed one undivided tenth part thereof, as a posthumous son of Christian Kolb, who died seized of the premises, having first made his last

will and testament, dated 24th March 1774, wherein he devised his lands to his executors to be sold by them, as they should think proper for the benefit of his heirs, (naming each of his children,) in equal shares, but his eldest son to have one shilling sterling more than the rest. He also gave a legacy of 20*l.* and a cow to his widow. On the 28th May 1774, the executors sold the lands to Henry Reiffe, for 255*l.* 15*s.* 9*d.*, who afterwards contracted with Andrew Bensell, but dying before he made his conveyance, his widow and children afterwards conveyed to him on the 15th June 1798, in consideration of 280*l.*, and the defendant was his tenant.

An inventory was taken of the effects of Christian Kolb, immediately after his death, whereby his personal property was valued at 115*l.* but by the advance made by the sales, it amounted to - - 156*l.* 7*s.*

In the administration account settled on the 4th December 1781, there was credited to the executors, exclusive of the legacies to the widow, - - - 297 3 9

So that there was a deficiency of personal assets of £140 16 9

At the time the lands were sold by the executors, the fences were in bad order. Bensell put up new fences, built a good double log barn, walled in the cellar, and made other improvements.

Mr. Bowie for the defendant, argued that the law would not countenance a valuation of lands thus improved by a second purchaser, without notice. The act of 23d March 1764, § 5, (1 Dall. St. Laws, Append. 48,) puts children born after the death of their father, on the same equal footing with the other children, and as if the father had died intestate. Lands directed to be sold, are considered as money. 9 Mod. 170, 1 Salk. 154. 1 Atky. 420. A posthumous child shall not defeat a power given by the will of his father to the executors to sell the lands. The reason of the common law, is the best rule for the construction of statutes. 4 Bac. 647. There can be no lien on the lands sold, nor is there any privity between the lessor of the plaintiff, and the present purchaser. The executors may be guilty of a *devastavit*, as to the child's distributive share, but having sold the lands under a proper authority, the premises are discharged from liability. It cannot be contested that the share now claimed by the plaintiff, is exempted from a just proportion of the father's debts and expenses of administration. At the time of the testator's death, there was a deficiency of person-

property of 140*l.* 16*s.* 9*d.* and consequently 14*l.* 1*s.* 8*d.* with the interest thereon, is properly chargeable against such share. Without payment or tender thereof before the suit brought, the plaintiff is not entitled to recover. But if a recovery should take place, the purpart is still liable to valuation, in case partition cannot be made without prejudice to or spoiling of the whole ; and if Bensell's improvements are not to form a part of the valuation, the result would be that the lessor of the plaintiff would be entitled to 11*l.* 9*s.* 10*d.* the one tenth part of the balance of 114*l.* 19*s.* formed in the following manner.

Amount of the personal estate sold at vendue.	156 <i>l.</i> 7 <i>s.</i>	
Do. of the lands sold at do.	-	255 15 9
		<hr/>
		412 2 9
Deduct debts and expenses of administration as set-		
tled in account in 1781,	-	297 3 9
		<hr/>
Balance,	-	114 19

So that in the event, the lessor of the plaintiff by a circuity of action, would get what it is now conceded can be recovered from the executors, with little difficulty or expense.

Mr. Hopkins for the plaintiff, admitted, that the land of a testator would descend to a posthumous child, charged with a proportion of the debts ; and if the plaintiff should recover, it would still remain chargeable with such sum. If he is bound to pay interest, he is also entitled to his share of the profits. No laches can be imputed to a minor. The purchasers cannot be considered as without notice. The law operates as a supplement or codicil to the will, and the birth of the child must have been notorious. The case must be decided on principle. By the supplement of 1764, to the old intestate act, the father shall be deemed and construed to die intestate, so far as regards posthumous children ; and such children shall be entitled to like purparts, shares and dividends of the estate real and personal of the father, as if he had actually died without any will. The terms of the law are strong and comprehensive ; but the arguments of the defendant's counsel would go so far, as to leave the child without remedy, provided the executors are insolvent. This never could have been the intention of the legislature.

The court declared their opinion, that circumstanced as this case was, the plaintiff was not entitled to recover, not having paid or tendered his proportional part of the deficiency of the personal estate,

previous to the commencement of the suit in 1789. The lands were assets for the payment of the testator's debts, and if the executors had not paid them by a sale of the lands, the sheriff must have performed that office. The deficiency in the present instance, appeared on record, eighteen years before this suit was brought, and operated as notice thereof to the lessor of the plaintiff. If he could now recover, the debts being adjusted and paid by the executors, he might sell the lands immediately, and free his share of all liability as assets.

They added also, that they did not determine even if this proportional part had been paid or tendered, and now brought into court, that the plaintiff would be entitled to recover one tenth part of the lands thus improved by a stranger. The law contemplated the posthumous child as taking his share at the time of his birth, according as it then would be divided or appraised, and not depending on improvements made by strangers. It seemed an outrage on justice, that such child should derive any benefit from the expenditures or labors of a purchaser.

But on the subject of the liability of the purpart of the posthumous child, to a due proportion of the debts and expenses necessarily incident, the court differed in opinion.

Yeates, J. declared, that he thought the lands continued liable to the lessor of the plaintiff for the amount of the just balance due to him for his tenth part, charging him with interest and crediting him with a proper proportion of the profits. The will is void as to him, by the express words of the act of 1764, and his father as to him died intestate. The authority granted to executors to sell lands, is no more binding on a posthumous child, than if such a power was given by a will, when a man was unmarried, and he afterwards married and had children. But a posthumous child is only entitled to partition, where it may be made without prejudice to, or spoiling of the whole estate devised, and neither he nor his vendee can hold the share on any other terms than as subjected to a valuation, in case the premises would be injured by a division. As to him however, the father dies intestate, and nothing that the executors can do, can change his security from realty to personalty.

Brackenridge, J. declared his opinion during the argument, that the lessor of the plaintiff being put on the same footing with the other children, clearly answered the object of the law; and the executors having sold the lands for the full value, under a proper authority in the will, the premises were discharged from all lien, and

the lessor of the plaintiff was confined to the executors for his remedy.

On the next day, he expressed great doubt and seemed to retract his opinion, respecting the liability of the lands.

The plaintiff suffered a nonsuit, under the direction of the court, with liberty to move the same again, if he should think proper.

HENRY WEAVER *against* WILLIAM COCHRAN.

Service of notice of a rule to take depositions on the special bail of defendant is not good, though he attended and cross examined the witness, if another person usually acted as agent in the defendant's absence.

DEBT for penalty of articles of agreement.

The plaintiff offered the deposition of Robert Howie in evidence, on notice given to James Agnew, the special bail, and he attending and cross examining the witness.

This notice was excepted to ; and it was proved to the court, that Agnew never acted as agent in the cause, though his father had usually acted as such in the absence of the defendant in Virginia ; and that neither of them had ratified this act of the special bail. They cited Bauman and wife v. Kimmel et al. determined last week at Lancaster.

The court rejected the deposition, and said the rule in all such cases should be expressed more particularly.

Messrs. Duncan and Montgomery, *pro quer.*

Messrs. Bowie and Hopkins, *pro def.*

Lessee of JAMES STEEL and AGNES his wife, late NELSON late LATHAN *against* ANDREW FINLEY, ALEXANDER TURNER and WILLIAM MILLIGAN.

Where one defendant in ejectment states a special defence, disclaiming particular lands, and another defendant who has taken a special defence, gives it up on a trial, the former shall not be at liberty to show an early adverse right to the lands he has disclaimed.

A letter from the secretary of the land office, asserting the contents of a paper he had seen, is no evidence of fact.

If one obtains a second survey on a warrant already filed, he thereby abandons his first survey, if the same was not returned into the surveyor general's office before an adverse survey is made.

EJECTMENT for 140 acres, 3 quarters and 18th perches, in Hope-well township. Special defence taken by Finley.

The plaintiff claimed under a warrant to Hugh Purdy, dated 5th December 1764, including his improvement in the Barrens, a survey made by William Matthews on the 20th December 1764, and divers mesne conveyances to Hugh Nelson, who devised the same to his daughter Agnes, one of the plaintiffs in fee. She intermarried with David Lathan, and together with him during her minority conveyed to William Orr, without any separate examination as the law requires, and a mortgage was taken for the consideration money, which was never recorded. Orr conveyed to Patrick M'Grille, and he conveyed to Turner, one of the defendants, who leased to Milligan another defendant, on the 15th March 1789, for two years, he engaging to deliver up possession on the 15th April 1791. Pending that lease, the present ejectment was commenced.

The special defence of Andrew Finley, excluded a portion of, land, which had been cultivated above twenty years by the different persons under whom the plaintiff claimed, marked in the diagram W, containing above 20 acres. He founded his pretensions on two warrants, in the name of his father John Finley, one for 50 acres, dated 1st April 1751; and the other for 100 acres, dated 4th April 1754; a survey on the first by Thomas Armor on the 16th April 1752; and a re-survey by William Kersey and William Matthews, in consequence of an order of the Board of Property of the 31st December 1770, made on the 18th November 1774, pursuing the old lines, containing on the first warrant 145½ acres, and on the last 204 acres, for the said Andrew Finley.

He also showed a conveyance from his said father to himself, for the two surveys, dated 4th November 1760, in consideration of 200*l.*, and a subsequent patent to his father for the same, dated 22d August 1788. But it appeared, that on the original warrant of 1st April 1751, John Finley had assigned the same to

Thomas Armor on the 4th October 1752, and Armor had assigned the same to the said Andrew Finley on the 27th April 1761. These assignments were made in the hand-writing of Armor, and had been attempted to be obliterated, but they remained sufficiently legible. The lands thus surveyed were called "Cabrach."

The defendant Finley also obtained a survey of 120 $\frac{1}{2}$ acres, to be made upon the first warrant on Deer creek (above ten miles distant from the lands in question) by the said Armor, called "Rosemary Meadow," and that he had indorsed the same 120 $\frac{1}{2}$ acres on the same warrant to have been returned for Andrew Finley on the 4th May 1765.

The aforesaid Hugh Purdy had originally contracted with the said Andrew Finley, before he made his improvement, though the particulars thereof, or the consideration, did not appear. Several suspicious circumstances occurred in this transaction against Finley that he had not acted fairly by Purdy. The former lived on the adjoining tract for above twenty years, and suffered the different possessors to go on improving, without claiming the premises or molesting them.

The court observed, that as to the claim of Turner, and Milligan his tenant, there could be no pretence of title, because they held under the plaintiffs' right, and the deed from Lathan and wife, having been established to have been made in the infancy of the wife, though she held in her own right, and she not undergoing a proper separate examination, was void in itself after the death of Lathan, unless it could be proved that she ratified the same afterwards. Mr. Clark, who appeared for Turner and Milligan, gave up their defence at the Bar; but Mr. Bowie urged, that he was concerned for one household, in whom was vested an interest, under a warrant granted to Robert Carr, dated August 1753; a conveyance thereon to George Stevenson, dated 21st September 1764, and a survey by him of 152 acres and allowance, on the 27th of the same month; and that any title might be given in evidence to show that the plaintiff was not entitled to recover any part of the lands.

By the court. Undoubtedly you may do so if there are proper parties. Finley has disclaimed by his special defence the land marked W in the diagram; but if Carr's warrant and survey can assist him in the portion he contends for, he can make use of it for that purpose. Turner and Milligan have wisely relinquished the claim by their counsel. Householder we know not. If he wished to contest the plaintiff's title, he ought to have procured himself to be made a party to the suit. He was in possession of no part of the lands claimed by the plaintiff, when the ejectment was served. Let him

bring his new ejectment for portion W ; for in the present suit the plaintiff must necessarily have a verdict for it.

A letter from William Peters, then secretary of the land office, to Hugh Purdy, dated 28th August 1765, stating, that he had seen and considered the written contract between him and Andrew Finley, dated the 21st April 1762, and advising him that he had a remedy on the special warranty contained therein, &c. was offered in evidence by the plaintiff.

This was opposed by the counsel of Finley, because it was no public document, but written by Mr. Peters as a counsel ; and if it even were such, it would be no legal evidence of the fact recited therein.

To this the plaintiff's counsel answered, that the title of Purdy was divested by a sheriff's deed, and it could not be presumed that such a purchaser would receive all the title papers ; and that the transaction respecting them having been a contract being already established by other proof, an inferior kind of evidence might be received, corroborating the fact. Besides a letter from James Steel, receiver general and secretary of the land office, has been adjudged good evidence, 1 Dall. 6. [That letter was in fact an order of survey and was usual between 1718 and 1732.]

The court being divided in opinion on this point of evidence, asked the plaintiff's counsel, if they would agree, in case the letter was received in evidence, and a verdict should be given for their clients, that a new trial should be granted, provided the Supreme Court in bank should consider the testimony as inadmissible. To this they answered, that they could by no means accede thereto. Whereupon Yeates, J. still adhering to his opinion, that the evidence could not be received on either of the grounds stated, the letter was overruled.

The court, after full argument by the counsel on both sides, gave it in charge to the jury, that for the reasons already given, the plaintiff was clearly entitled to recover the lands marked W. As to the remainder of the lands, they left it to the jury under all the circumstances of the case, who was in default respecting the contract, said to have been in existence between Hugh Purdy and Andrew Finley. The silence and acquiescence of the latter respecting his claim for so long a period, as well at the sheriff's sale as afterwards, formed a strong presumption against him. But independent thereof, they laid it down as a clear rule of law, that if a per-

son obtains a second survey on a warrant which has been once filed, he thereby abandons his first survey if the same was not returned into the surveyor general's office, before an adverse survey is made, provided the same was done with his consent or procurement. Every survey shall be presumed to be made with the full consent of the party, unless the contrary appears; and the circumstances of the present case strongly fortify the legal presumption.

Verdict *pro quer.*

Messrs. Duncan, C. Smith and Kelly, *pro quer.*

Messrs. Bowie, Hopkins and Clark, *pro def.*

Lessee of DAVID ERB *against* ALEXANDER UNDERWOOD.

A creditor on a domestic attachment, wherein the auditors have sold and conveyed lands, and subscribed a receipt for the consideration money, may be a witness to show that a former sale of the same lands by the debtor was fraudulent. One who has executed a deed with words of general implied warranty, not to be received as a witness to invalidate it; nor to prove that he has not received the consideration money, if he has signed the receipt for it.

EJECTMENT for one messuage, one grist-mill, and saw-mill, &c. and 54 acres of land in Dover township.

It was admitted that the lessor of the plaintiff was seized of the premises in fee.

On the 27th March 1797, he entered into articles to convey the same to Thomas Paup, in consideration of 3200*l.* payable in instalments; and conveyed the same to him accordingly, on the 2d May following, by deed duly executed and recorded.

On the 24th May 1798, Paup and wife convey the premises to Isaiah Harr, in consideration of 1800*l.* by deed duly executed and recorded; under whom the defendant holds. On the evening of the same day Paup absconded, and on the 29th May oath was made under the domestic attachment law, and a domestic attachment issued at the suit of Erb against him, on which the mills and lands and outstanding moneys were attached, auditors afterwards were appointed, who settled the demands against him, and on 3d August 1799 "granted bargained and sold," the premises in question to the lessor of the plaintiff in consideration of 1055*l.* subject to a mortgage to Jacob Leather for 950*l.*—a receipt was subscribed for the consideration money, and the deed was acknowledged in the court of Common Pleas, on the 2d September 1799.

The sole question to be tried, was the validity of the conveyance to Harr, and whether it was not made with the intention of defrauding the creditors of Paup?

Several suspicious circumstances having been disclosed in

evidence, the plaintiff's counsel offered Thomas Pettit as a witness, to show other circumstances. He was objected to, on the ground of interest, as being a creditor of Paup under the attachment, and William Patterson, one of the auditors, who was produced to show that in a conversation with him, Pettit acknowledged, that he was to receive no part of his debt, unless the plaintiff succeeded in this suit.

The plaintiff's counsel excepted against the testimony of Patterson. He with the auditors have signed and executed a conveyance to Erb, with words of implied warranty, under the act of assembly. How can he be adduced to affect or invalidate the operation of his own deed?

Per curiam. Surely he cannot, unless the general implied warranty is controlled and restrained by more particular covenants in the conveyance. 2 Bos. and Pull. 13, 26. 4 Co. 80. b. Vaugh. 126. Cro. El. 574. Ambl. 250. We cannot see that Pettit can be affected in interest by any decision in this case, unless he is considered as a party carrying on the suit, and his pretensions to rest on the event. He is now entitled to his rateable part of the sum raised by the auditor's sale of the mills.

The defendant's counsel then insisted to examine Patterson, to show that the consideration money of the deed had not been paid by Erb, under a special agreement, though the auditors had subscribed the receipt.

But by the court. The evidence is offered flatly to contradict the written expressions of the auditors, and is inadmissible on every principle of law. No mistake or fraud is suggested here. Could a sheriff, after he has sold and conveyed lands, and signed a receipt for the consideration money, be allowed to establish by his own oath, that he had not received the money, and thereby purge himself of all responsibility?

The testimony of Patterson was overruled, and Pettit was received as a witness, and sworn.

Verdict for the plaintiff.

Messrs. Duncan, Hopkins, Clark and Cassat, *pro quer.*

Messrs. Bowie and Watts, *pro def.*

AT A CIRCUIT COURT, AT CARLISLE, MAY 1801.

CORAM, YEATES AND BRACKENRIDGE, JUSTICES.

Lessee of JAMES CARUTHERS *against* JOHN CARUTHERS.

Quære, when a survey shall be said to be made, on a warrant or application, under the 5th section of the limitation act of 26th March 1785.

EJECTMENT for 14 acres and 123 perches of land, in West Pennsbro' township.

The plaintiff claimed under an application, dated 9th March 1767, for 300 acres of land in the barrens of Cumberland county joining William Caruthers and James Caruthers.

In the spring of the same year, Samuel Lyon, esq. assistant of the deputy surveyor of the district, began to make a survey under the application, beginning at a hickory corner of James Caruthers, senior, uncle of the lessor of the plaintiff, and run five courses to a white oak stump. William Caruthers, his father, who claimed the lands lying to the eastward, was dissatisfied, and said his other children would be defrauded thereby, and left them in dudgeon. Nothing further was then done. But on the 30th August 1770, William Lyon, esq. another assistant surveyor, was taken to the ground to complete the survey. He began where the former courses ended at the white oak stump, and run three courses to a black oak, which if pursued, would have run into the clear field of James, the uncle. He upbraided his nephew therewith, but the latter still insisted on finishing the survey, and search for the lines of an old survey, made in the name of Harkness, and then vested in his father, intending to adjoin the lands thereof. Not being able to discover these lines, the lessor of the plaintiff directed the surveyor to stop, and promised to call on him with the draft of Harkness's survey in order to complete the survey. He next day paid him 40s. the surveying fees, but never called on him again to finish the work; nor was any further attempt made to conclude the business, until in December 1798, when a survey was perfected by Samuel Lyon, under the application, containing 192 acres and 11 perches; which being nearly five years after the ejectment was entered, was of course rejected by the court.

It appeared, that lines running from the white oak stump or black oak, where the first and second surveys terminated, to the hickory the place of beginning, would in either case, exclude the

lands in question. The last course to the black oak was S. 10½ W. and in order to include the disputed part, which lay direct north of the two preceding courses, it would be necessary to conduct the survey by running by easterly, northerly and westerly courses, to reach the place of beginning, as was done in 1798, when nine new courses were run.

The lessor of the plaintiff had 15 or 20 acres of cleared land, adjoining the old place of his father, some years before he took out his application, the nearest part whereof was about 50 or 60 perches, but the bulk of the improvement 150 perches distant from the lands in controversy.

The defendant claimed under a warrant to his father, James Caruthers, senior, for 300 acres including an improvement, bounded by land of William Caruthers, John Davison, John Young, George Davison and William Cochran in West Pennsbro', interest to commence 1st March 1770. On the 12th December 1785, a survey hereon was made by Samuel Lyon, containing 330 acres and 7 perches, and a patent was obtained on the 10th January following.

The settlement began between 1756 and 1762, and in 1770, he cultivated 40 acres of cleared land, and had a large field north of his house; and this house was only 10 or 15 perches from the disputed line.

The court, after the cause was fully argued by counsel, disagreed in opinion, whether the plaintiff was barred by the limitation act of 26th March 1785, (2 Dall. St. Laws, 282, § 5,) and expressed their sentiments to the jury in separate charges.

Brackenridge J. in substance said, that the plaintiff's location was descriptive of the lands in dispute, by calling for William and James Caruthers. The limitation act was grounded on the inconveniences resulting from pocketed locations; but where the warrant or application has been put into the hands of the surveyor to be executed, it rebutted all presumption of abandonment; *a multo fortiori*, where a survey had been begun, though imperfect in all particulars. As to the defendant, it was perfect, because it drew a dividing line between his improvements and the lands in controversy. So a location calling for natural boundaries, is out of the limitation act. It is true, the lines as run do not include any space, but it is common to leave an open line, and the running of a few courses more, would complete the survey in the present instance. Here the defendant's uncle prevented the completion of the survey in 1770. The plaintiff made two efforts for this purpose, but was unsuccessful in each. He was in no default, but paid the full surveying fees.

He had made prior improvements, and must have intended to include them; and his taking possession is strong evidence of his intentions. Besides, the shape and figure of the defendant's survey is very unreasonable, when the prior legal right of the plaintiff came to be considered. And on the whole, he concluded, that the plaintiff was entitled to a verdict.

Yeates J. admitted, that the small disputed gore, might be described by the plaintiff's location; but the same remark was equally applicable to other lands, adjoining those call for, lying in other directions. It could not be deemed a close, precise application, comparable to one calling for natural boundaries.

The law in question is declared to have been made, "for the quieting of estates and the greater security of real property." Secret orders of survey kept back for years, without any efforts to execute them, were undoubtedly intended to be guarded against; but an application whereon a survey has been begun one year, taken up again in three years, and not perfected for the term of twenty eight years, afterwards, has many serious mischiefs attendant on it. It tends to litigation, and prevents the settlement of the country; for no one can tell what new courses are meditated. Nine courses run, and nine *in fieri*, cannot with any propriety be called a survey made, within the expressions or meaning of the legislature. Merely putting a warrant into the hands of the acting surveyor, does not obviate the inconvenience intended to be obviated. More is to be done by the applier. It is true, if the surveyor either through fraud, partiality or negligence, does not proceed in his work, every thing reasonable being done on the part of the applier,—or if he is prevented by force or menace or the *caveat* of the adverse party, it will form an exception to the generality of the words. In this instance, though the father and uncle of the lessor of the plaintiff were dissatisfied with his projected survey, they did not obstruct its completion. The former left him, as the party were going on; and notwithstanding the reproaches of the latter, he was peremptory in concluding the business, and was only stopped from his purpose by the want of Harkness's survey. This he engaged to procure and to call on the surveyor with it, but failed therein. Is not then gross laches justly attributable to him?

It is certain, that the public surveyors do not run the closing line; and no evil arises herefrom, because the notice is general, and the lands comprehended by the survey are accurately ascertained. But the plaintiff had no effective survey made on either day. No definite space was comprehended. He meant to go

further a-field. A line subtended from the white oak stump or black oak, to the hickory, leaves out the present object of contention. How could it be known to what extent, or in what direction his inclination might lead him ?

As to his reducing his application to a certainty by taking possession, he had only cleared over his father's lines ; but if it is to be deemed an improvement, he disclaims all equity under it, by not inserting it in his location, if he intended to include his clearing. The uncle's warrant was more correct, though not sufficiently so. One of the witnesses speaks of his settlement as made in 1756, another in 1761 or 1762, and the interest on his warrant only commences in 1770. Considering the mere improvement rights, the defendant's title appears most preferable. The uncle was actually settled on the land with his family, had actually 48 acres of land in cultivation thirty-one years ago ; his dwelling house only a short distance south of the boundary of the lands in dispute ; and had a considerable intermediate field then cleared.

He further added, that in either view of the case, he thought that the plaintiff ought not to recover the premises in question.

The jury appeared at the bar next day, ready to give their verdict, but the plaintiff suffered a nonsuit.

Messrs. Hamilton and Duncan, *pro quer.*

Messrs. C. Smith and Waltz, *pro def.*

Lessee of JAMES TODD *against* JOHN PFOUTZ.

In what cases performance of an agreement as to the sale of lands will be enforced, where no money has been paid, but bonds given.

The cases in England on this subject are not strictly applicable to this state.

EJECTMENT for 300 acres of land in Greenwood township.

It was admitted, that Benjamin Poultney was seized of the lands in question, prior to the 24th June 1783.

On that day he entered into articles of agreement with Leonard Pfoutz, whereby after reciting that Pfoutz had executed to him three obligations, each conditioned for the payment of 138*l.* 6*s.* 8*d.* on the 1st May 1784, 1785 and 1786, Poultney covenants, that when these bonds are paid, he will procure a patent for, and by a firm conveyance assign over, all his right to 158 acres and 123 perches of land, surveyed in the name of Jacob Gardiner, on the 13th May 1766, under a warrant dated 4th June 1762, unto the said Leonard Pfoutz, his heirs and assigns.

On the 3d July 1784, Leonard Pfoutz assigned to the defendant John Pfoutz and his heirs, all his right and interest, subject to the payment of Poultney's bonds. In consequence whereof, the defendant entered into possession, built a good house one and a half stories high, with a single roof, and a piazza likewise covered, a good double barn covered with boards and slabs, a saw-mill completed at a great expense, cleared between 80 and 100 acres of land, planted an orchard, and made other good improvements. He had paid no part of the bonds according to his stipulation; but it was agreed on by the counsel, that the consideration money should be considered as lodged in court, ready to be paid to the lessor of the plaintiff, who was admitted to be the legal representative of Poultney who died in 1793, in order that the question might be determined, whether, after so great a delay, a specific execution of the agreement would be enforced.

Mr. Duncan for the plaintiff contended, that it would be highly inequitable, that a vendor should be bound to perform his contract, when the vendee has been guilty of the grossest delay, by withholding payments for fifteen, sixteen and seventeen years, and the object of the sale daily rising in value. The performance of a contract which has lain dormant many years, will not be decreed. 5 Vin. 534, pl. 38. 1 Fonbla. 321, 322. The conduct of a party attended by circumstances of delay, will be considered as evidence of abandonment of his contract. 4 Bro. Ch. Rep. 470. There may be such a difference in point of value arising from the delay, as may be a good reason for not compelling performance of the contract. *Ib.* 329, Pincke v. Curtis.

Mr. C. Smith for the defendant urged, that it would be equally if not more inequitable, that a purchaser should be deprived of the most valuable improvements without compensation, when he is willing, though at a late day, to pay the full consideration and interest. The legal measure of damages for non-payment of money, is interest, which is deemed an equivalent. Equity will relieve against the breach or non-performance of a condition, whether it be precedent or subsequent, where a compensation can be made. 1 Bac. 506. 1 Fonbla 199, 200.

The court said, that facts had not been sufficiently disclosed, to enable them to form an accurate judgment on the point submitted to them. It was hardly possible to believe, that no communications had passed between the vendor and his representatives, and the defendant, on the subject of their purchase, for above seventeen years. Had no

money been paid or tendered? Had no further time for payment been given? Had no money been demanded?

The cases in England are not strictly applicable from our local situation. European lands are more stationary, and do not rise so rapidly in value as in a new country: and it will become a question of moment, how far the English decisions should be adopted, on agreements of considerable standing, where little or no money has been paid, and the state of property has greatly altered. Every case must depend on its own particular circumstances. It is always discretionary in a court of equity, whether they will decree the specific performance of a contract or not. 4 Bro Cha. Rep. 87. 1 Ver. jr. 565. Where trifling or backwardness has been shown in the performance of an agreement, a specific execution will not be decreed, especially if circumstances are altered. 1 Fonbla. 384. 5 Vin. 538, pl. 18. But the prevailing distinction in equity, as to compensation for the breach of a condition, has been justly stated by the defendant's counsel. Yet notwithstanding this, shuffling off payment of the money and delay, will excuse from the specific execution of articles; (2 Equ. Ca. Ab. 638, pl. 5) and where either party has been guilty of gross negligence, the court will not lend its assistance to the completion of the contract. 4 Bro. Cha. Rep. 497.

If part of the consideration money has been paid on an agreement for the sale of land, it will not be vacated by default of payment of the residue. 2 Wms. 66, 3 Wms. 187. We believe it will be found on examining the books, that in almost all the cases, where equity has refused to interpose their aid to complete an agreement, either circumstances have greatly altered, or there have been no bonds given, money paid, full possession delivered, or valuable improvements made. Here bonds have been given with warrants to enter up judgments, whereby the sellers might have enforced the payment of his debts, complete possessions delivered, and permanent valuable improvements made, at a great expense. Still we deem it most eligible, in the present state of the facts, to give no decided opinion. The ends of the justice will be fully answered by taking a verdict for the plaintiff for the premises and judgment thereon, with a stay of execution until the 1st November next. Let this judgement be subject to defeasance on the payment of the sum justly due under the articles, with interest and costs, before that day. If not then done, let the judgment be peremptory.

The parties acquiesced in the recommendation of the court, and a verdict was taken accordingly.

STEVENSON, MACKIE and Co. *against* JOHN CAROTHERS, esq.

Sheriff not liable for an escape, where an insolvent debtor, taken under a *ca. sa.* out of the Supreme Court, has been discharged by two justices of the Common Pleas of the county where he lives, or giving bond, pursuant to the 14th section of the act of 4th April 1798.

CASE stated for the opinion of the court, in escape.

A judgment was duly obtained against John Wray, at the suit of the plaintiffs, in the Supreme Court, founded on the report of referees, for the sum of 144*l* 17*s* 8½*d.*, with interest from 9th August 1799 ; and a *capias ad satisfaciendum* regularly issued out of that court against John Wray aforesaid, directed to the defendant, then and now sheriff of Cumberland county. In pursuance of the said writ, the said defendant arrested the said John Wray in vacation, and he was thereon confined in the gaol of the said county. He remained in confinement until upon an application, under the act of assembly, passed 4th April 1798, a warrant of discharge issued from two of the judges of the Common Pleas of the said county, directed to the gaoler, requiring him to liberate the said John Wray from confinement, under that execution ; and the sheriff returned upon the said execution, that he had taken the said John Wray into custody and committed him to the gaol of the said county, and that he was discharged by virtue of a warrant issued from the judges of the Court of Common Pleas of Cumberland county.

The petition of the said John Wray, under the act aforesaid, is founded upon an arrest and confinement upon the said execution ; and at the time of the aforesaid arrest and discharge, the said sheriff had no other execution whatsoever in his hands against the said John Wray.

The question submitted to the court is, whether the defendant is liable for an escape ?

Mr. C. Smith, *pro quer.* The doubt arises on the 14th section of the act of 4th April 1798. (4 St. Laws 274.) The words are, "if any debtor in vacation shall be arrested in execution, and shall apply by petition, to any two judges of the Supreme Court, or to the president, or any two judges of the Common Pleas for the county where the debtor resides, and give bond to the plaintiff, conditioned that he shall appear before the court, of which the said judge or judges is or are a member or members, at the next term, &c., in such case and on such bond being given, the said judge or judges may give an order to the sheriff, gaoler or keeper of the prison, to discharge the said debtor, who is hereby required to discharge and set him at liberty forthwith." The true construction of this clause I take to be, that the judges who

takes the bond must be members of the court from which the execution issued. They can only take bond for the appearance of debtors in their own court ; and it is incongruous to suppose that the members of one court, perhaps of an inferior degree, should supersede the process of another court. This also comports with the provisions of former laws on this subject. The present case appears similar to that of *Brown v. Compton*. 8 Term Rep. 424. The sheriff was there held liable for an escape, for the act of the gaoler, in discharging an insolvent debtor out of gaol, in pursuance of an order of justices of the peace under the statute of 37 Geo. 3, c. 112, their proceedings not being warranted by the words of the statute. That was considered a hard case by all the court, and application was made to parliament, but the bill did not pass. This may be deemed also hard ; but if the judges of the common Pleas had no legal power to take the bond, their act was a mere nullity, and no justification to the defendant. The discharge of an insolvent debtor by a court not having jurisdiction is illegal and void. 1 Salk. 273.

Mr. Duncan for the defendant, contended, that the bond had been taken by the proper judges duly authorized. It is true, the old law of 14th February 1729-30, directed, that the insolvent debtor should apply by petition to the court from whence the process issued. 1 Dall. St. Laws 257. But this provision may be attended with unfortunate consequences to poor prisoners, as in the instance of a debtor confined at Pittsburgh under a *ca. sa.* issued by the Supreme Court. The very title shows the humane intentions of the legislature when they passed the law of 1798. It is "an act providing that the person of a debtor shall not be liable to imprisonment for debt, after delivering up his estate for the benefit of his creditors, unless he hath been guilty of fraud or embezzlement." By the 1st section, persons not confined on process may apply for the benefit of the act. By the 18th section, all persons in actual confinement under adversary process, may at the next term after confinement, petition to be discharged. This act directs, that any debtor who shall be arrested in execution in vacation, may apply to two judges of the Common Pleas for the county where the debtor resides, and give bond, &c. These words show, that the judges here had the authority and jurisdiction in the case, and the gaoler did right in discharging Wray.

The court said, that the words of the section might well bear the construction put on them by the defendant's counsel and the practice was conformable thereto in the city of Philadelphia, where much of this kind of business was done for some time after the act had passed ; but that

a different construction had been adopted, and afterwards generally pursued there.

The case of *Brown v. Compton* was not analogous. Great weight was laid there on this point, that the justices at the sessions had no general jurisdiction over the question; they had none under their general commission, and the statute might have given the same powers to persons of any other description. But in this state, the Courts of Common Pleas have always had jurisdiction in the cases of insolvent debtors; and to say the most of what has been done here, it can only be observed, that the judges in a matter where they had jurisdiction, may have erred in the exercise of it. In a late insolvent case in the Supreme Court, where the debtor was taken in execution by process out of that court as well as from the Common Pleas of Philadelphia county, and discharged by the latter court, it was ruled that the discharge was legal. The 15th section of the act declares, that the sheriff's return of having performed the duties of his office, and the order of the court, judge or judges, as the case may be, shall be good and effectual to all intents and purposes whatsoever. By the 14th section, the sheriff is required to discharge the debtor, and set him at liberty forthwith, on receiving an order from the judges. It would be strange doctrine, to assert that the sheriff is highly punishable for keeping the party in confinement, and yet if he discharges him, that he is answerable for the escape.

Judgment for the defendant.

SHORTHOUSE and ROSS *against* JOHN CAROTHERS, esq.

One who has given bond according to the act of 4th April 1798, in an action on mesne process, cannot be taken in execution in the same cause, and if so taken may be discharged in vacation under a *habeas corpus*.

CASE stated for the opinion of the court.

A *capias ad satisfaciendum* was issued out of the Court of Common Pleas of Cumberland county, on which John Wray was arrested at the suit of the now plaintiffs, and committed to the gaol of the said county.

But before the issuing of this execution, the said Wray had been in custody on a bail piece in the same suit, on the 7th April 1800, having been surrendered by his special bail in term time, before judgment; and he afterwards, in term time, applied for the benefit of the insolvent act of 4th April 1798, and entered into bond with surety for his appearance under the law, and also in several other cases in which he was committed on bail pieces at the same time, and was therefore discharged from his confinement.

After issuing the *ca. sa.* by the now plaintiffs, and the taking of the said Wray into custody by the defendant, then and now sheriff of the county, a *habeas corpus* issued in vacation to the gaoler, by the judges of the Court of Common Pleas of the said county, who returned thereon, that the said Wray was confined upon execution at the suit of Shorthouse and Ross ; on which *habeas corpus*, the judges ordered the said Wray to be discharged, the execution having issued after the bond was given, when the said Wray was in confinement on a bail piece in the same suit. And Wray afterwards, on his application to the Court of Common Pleas aforesaid, in pursuance of the bond, duly obtained the benefit of the insolvent act of 4th April 1798.

The question is whether the sheriff be answerable to the plaintiffs for an escape ?

Mr. Watts for the plaintiff, and Mr. Duncan for the defendant, submitted the case to the court without argument.

Pur Cur. When Wray was discharged on the mesne process at the suit of the plaintiffs, and a bond given pursuant to the act to appear and comply with the law, they could have no power afterwards to take out the *ca. sa.* against him. Such a procedure contravenes the whole spirit of the law, and renders its provisions nugatory. The court or any judge in the vacation might order the party to be discharged, the issuing of the *ca. sa.* being an abuse of the process of the court. Wils. 369. Vin. Hab. Cor. 215. pl. 3.

Judgment for the defendant.

AT A CIRCUIT COURT, AT LEWISTOWN, MAY 1801.

CORAM, YEATES AND BRACKENRIDGE, JUSTICES.

LESSEE of ALEXANDER SCOTT *against* JACOB LEATHER.

One claiming lands under the assignees of a bankrupt, need not show the trading and act of bankruptcy, against a title adverse to the bankrupt's.

A copy of the commissioner's assignment to the assignees, certified by their clerk admitted in evidence.

Exemplification of a deed recorded in Philadelphia county, for lands lying in several counties, received in evidence, the original being shown to be lost.

The return of an equitable interest arising from the discovery of vacant lands, may be shown by parol testimony.

EJECTMENT for 292 acres of land on the north side of Bald Eagle creek. The plaintiff claimed under a deed from Alexander Lowrey and others, assignees of the commissioners, under a commission of bankrupt against Mathias Slough, a bankrupt, to Samuel Miles, dated 12th March 1792, and by him conveyed to Scott on the 21st April 1794.

The plaintiff's counsel offered in evidence the petition of Caleb Foulke on the 15th June 1787, on which the commission of bankrupt issued.

To this the defendant's counsel excepted; unless it be first proved that Slough was a trader within the act, and also the act of bankruptcy. These things are necessary to be shown, in order to prove property under the commission. Bull. 37. In 5 Burr. 2628, the objection was taken that the debt of the petitioning creditor was of more than six years standing. In 1 Dall. 380-1, this matter is fully gone into, and shown.

The court said, there was an evident distinction, between cases where third persons claimed under or through the bankrupt, and where they claimed in another right, adverse to him. It will be found, that such points come in question in actions of trover brought by the assignees against persons holding property under the bankrupt, or where the debts of the bankrupt have been sued for. In 5 Burr. it was adjudged, that the objection of the debt of the petitioning debtor being barred by the statute of limitations, did not lie in the mouths of third persons. The debtor had not objected; he had submitted to the commission and been examined under it. In 1 Dall. the fairness of the certificate of conformity was but in issue by the pleadings. The plaintiff may go on.

A copy of the assignment of Slough to the commissioners dated 30th July 1787, certified by John Jennings their clerk

to be a true copy, compared with the original on the 28d September 1796, was offered to be read ; but was objected to, because Jennings was no official character, and his act was done after the expiration of the bankrupt laws.

The plaintiff's counsel answered, that the commissioners had power to appoint a clerk and make allowance for his trouble. They have no public seal, nor will they trust out their original papers. What then can a party do, except procuring a copy from their known officer? Does not the evidence rest on the same footing, as the certificates of the comptroller general of the United States? These are constantly received from the necessity of the case. The expiration of the bankrupt laws can have no effect on interests, vested during their existence.

Yeates, J. had some doubts of the propriety of the evidence adduced ; because the plaintiff might have produced a person, who had compared it with the original. But the same having been ruled by Smith and Brackenridge, Justices, at the last Circuit Court, to be admissible evidence in another cause, he agreed that it should be received, and desired the counsel, if dissatisfied therewith, to take a bill of exceptions.

The exemplification of the deed from Samuel Miles to the lessor of the plaintiff, certified by Matthew Irwin, recorder of deeds for the city and county of Philadelphia, was then excepted to, by reason that the same had not been recorded in Mifflin county.

The lessor of the plaintiff having made oath before the president of the 2d district, that the original deed had been lost, and could not be found on the most careful search, the court admitted the exemplification in evidence.

It appeared in evidence, that James Crampton, Joseph Poultney and Thomas Holt had made the original discoveries of twenty two tracts of vacant land, (of which one of them is the tract in question) and had interested Robert Callender in one fourth part thereof, in consideration of his taking out the office rights. Callender afterwards let Slough, who was his brother-in-law, into one moiety of the concern, and the latter filed the applications in the secretary's office, in the hand-writing of George Gibson, another brother-in-law, countersigned by Lewis Weiss, the agent. These original applications were produced on the trial, the one for the land in dispute being in the name of Thomas Poultney. On the 3d October 1775, Joseph Poultney sold his right to his father Thomas Poultney, under whom the defendant claimed. Only nine of

the tracts proved fortunate in the lottery; and on the 22d December 1769, Slough paid Charles Lukens, the deputy surveyor, 32l. 2s. for surveying the present tract and eight others. On the 29th August 1769, Crampton released his interest to Callender in consideration of 25l.

The plaintiff then offered to show by Arthur Buchannan, that Joseph Poultney had often declared to him that he had disposed of all his claim in the partnership concern of these lands to Callender for a valuable consideration; that these conversations passed in 1773, and previous thereto Callender came over to view this tract with Thomas Holt.

This was also opposed by the defendant's counsel, who insisted, that the act for prevention of frauds and prejuries, passed on the 21st March 1772, prevents freehold interests passing by parol. 1 Dall. St. Laws 640.

Sed per cur. The plaintiff claims under the application and survey. Thomas Poultney's name was made use of; but if Slough entered the location and paid the surveying fees, it is a resulting trust and saved by the act. It turns out, that Joseph Poultney assisted in the discovery of the locations, and had an equitable interest in the partnership lands. It is competent to show that he relinquished all his claims to the person who took out the legal rights by parol testimony, which may fix and designate "the act and operation of law" on the whole transaction.

A verdict passed for the plaintiff, and the court sealed a bill of exceptions on the points of evidence, ruled in the cause.

Messrs. Duncan and Watts, *pro quer.*

Messrs. Hamilton and Clark, *pro def.*

Lessee of JOSEPH SIMON *against* WILLIAM BROWN, esq.

A deed from the commissioners for lands sold for non-payment of taxes under their common seal, is no evidence of title.

A deed recorded without a proper probate, is no evidence of notice to subsequent purchasers.

EJECTMENT for 314 acres and allowance in Potter's township.

The defendant in the course of the trial offered in evidence a deed from the commissioners of Northumberland county, under their common seal, dated 8th October 1788, to John Thornburgh, in consideration of 13l. 10s., the same having been sold for state and county taxes for 1785 and 1786, and by Thornburgh assigned to Henry Drinker, on the 28th April 1795, in consideration of 50l.

But the court refused the same, and said that such deeds were mere nullities, and had been overruled more than once. If the object was to prove that these taxes had been assessed on the land, and thus paid by those under whom the defendant claimed, in order to raise an equity, those facts were capable of better proof by the duplicates and the treasurer's books.

The defendant claimed under an application entered in the name of Robert Semple, assigned to William Plunket on the 3d May 1782. The plaintiff claimed under the same application assigned to Joseph Simon on the 13th January 1769. To show a constructive notice to the defendant of this previous assignment to Simon, the certificate of its being recorded on the 26th March 1789, was offered in evidence.

The probate on which it was recorded, was the affidavit of Solomon Etting, before James Maxwell, president of the Court of Common Pleas of Franklin county, that Semple had acknowledged the assignment to be his, and desired it might be recorded; and that John M' Knight, Rebecca M'Nickel and John Chapman, were the subscribing witnesses thereto.

The court said, that the affidavit was illegal and informal, and did not authorize the recording of the transfer. It was no evidence whatever of notice to the defendant, and could not be received. See 3 Cranch 155.

Verdict for the plaintiff.

Mr. Hamilton, *pro quer.* Mr. Duncan *pro def.*

THOMAS TURBETT *against* DOROTHEA TURBETT and JOHN MOORE,
executors of SAMUEL TURBETT.

Every sentence and word in a will must be construed. The word estate in a will, will carry every thing, unless restrained by particular expressions.

ACCOUNT render. Pleas, never bailiffs or receivers, and fully accounted.

The action was brought under the act of assembly passed 21st March 1772, (Read's Dig, 231) and was founded on the will of Samuel Turbett, dated 13th June 1796, wherein after directing that his debts should be paid by his executors, he devises as follows:

"Item, my property in Lancaster, I order to be sold at the discretion of my executors, and the moneys thence arising, I order to be thus distributed: To my excellent friend Mrs. Elizabeth Fulton 50l.; to Kitty and Betsey Conner each 50l.; to Dr. Murray 50l.; and, to my nephew William Turbett, son of Jonathan, 200l. The residue of that part of my estate I give and bequeath to my dear wife Dolly, after a

genteel suit of mourning for my executors. With regard to my Tuscararo-estate, if my brother Thomas will take it at 1000*l.*, one half cash, or upon interest from the day of acceptance, and the other half to carry interest three years after that date. In case my brother Thomas refuses this offer, my executors will then proceed to the sale of that estate, by private or public sale, as they may judge best as well my stock, farming utensils, store goods, &c.; still reserving to my dear Dolly the Shilelah mare, and her furniture, together with all the household furnitures, of what kind or degrees soever. My apparel I leave entirely at her disposal. This property being thus turned into money, I order the widow of my brother John her dower, agreeable to his will, to be paid by my executors; and 200*l.* to be put out at interest for the dear orphan child Priscilla Turbett, daughter of my brother John, to be paid to her when she arrives at the years of discretion, and if she dies before then, that sum I order to be paid to my brother Thomas. These arrangements being made, I give and bequeath to my dear Dolly all the remainder and residue of that part of my estate, and to her heirs and assigns forever. My fine boy Lecky I order to be paid 20*l.* If my wife chooses to remain on the farm she has my approbation, reserving to herself two of the best milch cows. I bequeath to her my largest silver watch, and to William Turbett my smallest."

And appointed John Moore, and Dorothea his wife, the executors of his said will, &c.

The Tuscarora personal property was appraised as follows :

	£.	s.	d.
The stock, grain, and farming utensils, &c. at	323	5	6
Store goods, - - - - -	491	15	4½
Sugar, and family articles, - - - - -	81	12	0
Household furniture, - - - - -	80	8	6
Specific devises to the widow, - - - - -	79	15	0
Book debts, - - - - -	632	6	9½
Bonds and notes, - - - - -	456	0	0½
Cash in hand, - - - - -	11	6	6
	£. 2106	9	8

Besides the amount, the executors admitted that the testator was entitled to 6 per cent. stock nominal value, \$273 42
 3 per cent. do. - - - - - 202 4
 Deferred debt, - - - - - 186 72
 8 shares of Turnpike stock, - - - - - 900 0

The testator's place of abode was in Tuscarora, in Mifflin county. He performed a journey to Lancaster, fell sick, and died there on the 1st July 1796.

The plaintiff claimed the whole of the real and personal estate in Tuscarora, on his payment of the 1000*l*; and the court recommended to the counsel to agree on a special verdict, in order that the legal construction of the will might be ascertained. To this they would not accede.

The defendants offered to examine a witness, to prove that the plaintiff bought a number of articles, at a public vendue held of the personal property on the farm. This was objected to, because the will must be judged of by its own words, and the devise could not be affected by this fact.

Sed per cur. If the matter was to end in a special verdict, we should think the testimony idle and irrelevant. But if the jury are to determine the issues, surely it must be laid before them to assist them in ascertaining, whether these articles belonged to the plaintiff or not. With us the testimony has no weight.

An administration account exhibited into the register's office at Lancaster on the 16th January 1801, and there settled, was offered in evidence, and excepted to by the plaintiff.

The court asked the counsel, if exclusive of the *latent** ambiguity in the will, with respect to the words "Tuscarora estate," one of the issues was not fully accounted, and whether the defendants were not entitled to go into an account merely on that issue?

The account was received in evidence.

It appeared in evidence, that the balance in the hands of the executors, on the settlement of that account, for payment of debts, &c. amounted to 1398*l*. 15*s*. 3*d*.; and that there had been two late recoveries against them in the last Circuit Court, at Lancaster of about 430*l*. The testator claimed in his life-time two small houses, and a lot of ground in Lancaster; but on a trial at Nisi Prius after his death, it was deter-

* *Ambiguitas verborum latens verificatione suppletur; nam quod ex facto oritur ambiguitas, verificatione facti tollitur.* But the *ambiguitas patens* is never holpen by any averment. Lord Bacon's *Flem. reg.* 23. Vol. 2, 871, reg. 25, (4to ed.)

mined, that he held them in trust, and that they were only chargeable with the sum of 430*l.* or thereabouts, due to his executors.

Fourteen witnesses were examined as to the value of the Tuscarora lands, at the time of the testator's making his will in 1796, one half payable in hand, and the other half in three years, and they differed greatly in their estimates. Some thought them not worth 1000*l.*; others that it was their full price; others that they would readily have commanded that sum: and some others rating them from 1100*l.* to 1800*l.* But all the witnesses agreed, that they were of superior value to the plaintiff, than any other person, from the circumstance of his owning the adjoining tract of land. He himself acknowledged, after the death of his brother, that he had a good bargain of them at 1000*l.*

The plaintiff did accept the Tuscarora estate, and gave bonds agreeably to the terms of the will; but at the same time insisted on his being entitled to all the personal property there.

After the cause had been fully argued by Messrs. Duncan and Watts, for the plaintiff, and Messrs. Hamilton and Walker, for the defendant, the charge of the court was given to the following effect:

The intention of the testator must govern the construction of his will, and it must be collected from his own words. His true mind must be our guide; and we are not to judge from events, let the case be ever so hard, or injurious to any particular devisee.

It is obvious, that the will has been drawn incorrectly. It has been contended, that the testator must have contemplated a bounty to his brother Thomas, by his devise to him of the Tuscarora estate, at 1000*l.* and that he has the same pretensions to the personalty in Mifflin county which the widow has to the personalty at Lancaster; both being given by the same term estate; and that having made no provision for the sale of his stock, farming utensils, store goods, &c., unless in the event of his brother's refusal of his offer at 1000*l.* he must necessarily have intended, that the personalty should not be sold, if the offer was accepted; and of course, that it was included in the devise.

Every sentence and word in the will must be considered, in forming our judgment upon it.

It does not appear, that the testator had any personal property at Lancaster, except the few necessaries, which he carried with him on his journey. The two houses to which he conceived himself entitled there, must have been the objects contemplated in the expressions, my property in Lancaster, and that part of

my estate. A variety of cases have occurred on the legal meaning of the word "estate," in a devise. It will certainly pass a fee in a will, without words of inheritance. Skin. 194. 3 Mod. 45, 228. 6 Mod. 110 8 Mod. 255. 1 Wils. 333. Cowp. 301. 3 Burr. 1618. 4 Mod. 89. 1 Salk. 236. 1 Mod. 100. Comy. 340. Lofft. 95, 96, 100. 4 Term Rep. 93. 2 Vern. 564. Talb. Cas. 157, 184. 3 Wms. 297. Gilb. Rep. 284. 2 Atky. 102, 38. Doug. 730. 1 Dall. 226. It will carry every thing, unless restrained, or tied down by particular expressions. 1 Term Rep. 411. 2 Term Rep. 656. 5 Burr. 2639. It is *genus generalissimum*. It is natural to suppose, that the testator used the word estate, in the same sense, when applied to the property either in Lancaster or Tuscarora. The estate at the latter place is devised to his brother Thomas, if he will take it at 1000*l*. If he should refuse this offer, the executors are to proceed to sale. The testator guards against the event of his brother declining the pre-emption, at the stipulated price. He must therefore be supposed to have entertained doubts, whether Thomas would accept it; and to have fixed a sum something like the reasonable value of the lands. Indeed he holds up a strong apprehension, that Thomas would not take the lands; because in the close of his will, he directs, "if his wife chooses to remain on the farm, she "had his approbation, reserving to herself two of the best milch cows," which were part of his stock. It would be passing strange, to presume him to have any suspicions of his brother's declining to take the whole property, real and personal, in Mifflin county, at 1000*l*. when the personalty alone exceeded 2100*l*. and the lands were more valuable to Thomas than any other person! And yet this absurdity necessarily arises from the plaintiff's construction!

Nothing can be inferred from the power given to the executors to sell the stock, farming utensils, store goods, &c. in the single case of Thomas's refusal, to take the lands. The executors as such, had the undoubted right of disposing of the personal property, not specifically bequeathed.

A strong argument may be deduced from the circumstance of there being no express devise to the plaintiff, except the 200*l*. which he had given to his niece Priscilla, in case she died in her minority. He had bequeathed the like sum to his nephew William, and his small silver watch. But excepting this contingent 200*l*., he devised no legacy whatever to either of his brothers. Under the plaintiff's construction, can it be accounted for with any consistency, that the testator meant, in the event of his brother Thomas accepting the offer of the Tuscarora estate at 1000*l*. he should sweep away the great bulk of the whole

property ; and yet if he refused the terms, he should take nothing whatever ?

The testator gave to his widow all the residue of that part of his estate, deducting the legacies. This cannot mean of the limited price only of 1000*l.* because it is not so expressed. The residue of the money arising from the Lancaster estate, he had before devised to her. Must it not then necessarily refer to the personalty in Mifflin county and the sales of the land there, either to his brother or a stranger ? Does it not exclude the idea, that Thomas should take the personalty with the realty at 1000*l.* He draws a distinction between his estate in Tuscarora, and his stock, farming utensils, store goods, &c. Under the former words his lands are described ; under the latter his moveable property.

For these reasons, the court judging *ex visceribus testamenti*, are clearly of opinion, that the testator did not intend to include his personalty in, Mifflin county, in his devise of his Tuscarora estate to his brother Thomas ; and consequently, that the executors are not bound to account with the plaintiff therefor.

Verdict for the defendants.

EDWARD BATES *against* SAMUEL M'CRORY.

In partition, on the plea of *non tenent insimul*, the defendant may show in evidence an agreed line by the former owners, though his deed poll grants to him an undivided interest.

PARTITION. Plea *non tenent insimul*.

The plaintiff claimed under an application and survey, in the name of John Allet, who conveyed to Daniel Jones. On the 20th may 1785 Jones conveyed to the plaintiff Bates, and Jacob Kestler as joint-tenants, in consideration of 80*l.* On the 23d March 1790, Kestler conveyed his undivided moiety to William Early, who afterwards on the 1st April 1794, conveyed his moiety to the defendant, M'Crory.:

On the 27th January 1795, a patent issued to Bates and M'Crory as tenants in common.

The defendant's counsel offered to show, that Bates and Kestler had amicably divided the lands between them and built accordingly ; and that they had kept up a fence on the division line at their joint expense which had since been considered the boundary.

The plaintiff's counsel excepted thereto. The defendant opposes the deed under which he claims. Kestler conveyed an undivided moiety only to Early, and Early to the defendant.

The patent issued to the plaintiff and defendant, as tenants in common. These deeds work an estoppel. One may be estopped by indenture or deed poll. 3 Com. Dig. 271 Co. Lit. 352, *a*. So a bond may be an estoppel. Cro. El. 362. A party granting is in general estopped by his own deed. 2 Term. Rep. 171. All parties and privies are bound by an estoppel. Co. Lit. 352, *a*. Jo. 460. Poll. 61.

The defendant's counsel answered, that the doctrine of estoppels was odious, and merited restrain. 8 Mod. 312. Equity will relieve against them. 2 Fonbl. 470. They are however mutual and reciprocal; and must either bind both parties or neither. Co. Lit. 352, *a*. Cro. El. 701. 12 Mod. 361. The plaintiff Bates is not bound by either Kestler's or Early's deed; and why should it lie with him to urge them for his benefit? He has obtained a patent to himself and the defendant, as tenants in common; but this shall not free him of a former partition of the premises, if there has been one fairly made. Besides these deeds are no indentures; but deeds poll. A deed not indented is no indenture; neither is an instrument called such, an indenture unless actually indented. Co. Lit. 143, *b*. Matters of record or deeds indented may be estoppels; but not deeds poll except against the grantor, lessor &c. Co. Lit. 363, *b*. Estoppels are not to be favored; since they prevent the investigation of truth. 4 Term Rep. 254. A jury are not concluded from finding the truth of the fact, where it is directly within the issue, and when they cannot find the issue without consideration of it. 2 L. Ray. 864. A jury is not bound by an estoppel, where the party leaves the fact at large by the pleading. 1 Salk. 276.

The court said, it was competent to the defendant on the present issue, to go into the evidence offered. Whether they hold together and undivided, was the very issue the jury were sworn to try. They cannot now hold together, if they have agreed to a former division *in pais*, and actually executed the same.

The evidence was received, but was fully counterproved by the plaintiff. The line was fixed on for mere temporary purposes, and not intended to be peremptory; and this was shown to be the express agreement of the parties.

Verdict for the plaintiff.

Messrs. Hamilton and Watts, *pro quer*.

Messrs. Duncan and Walker, *pro def*.

AT A CIRCUIT COURT, AT HUNTINGDON, MAY 1801.

CORAM, YEATES AND BRACKENRIDGE, JUSTICES.

Lessee of JOHN MAXWELL NEBSIT *against* JAMES KERR.

The court have a control over their rules, and where a view has been had though founded on the certificate of counsel, where it is improper and unnecessary it will be discharged with costs.

This cause came before the court on a rule for trial by a special jury and view; and a view had been taken.

Mr. Duncan for the plaintiff moved, that the rule for a view should be discharged with costs. The cause has been twice tried by the judges of this court, sitting at *Nisi Prius*, and they must be sensible from their own knowledge of the case, that there can be no propriety or necessity for a view. Boundary cannot possibly come in question; and a view can only serve to prejudice the minds of the jury, by the partisans of the defendant.

Mr. Hamilton for the defendant insisted, that they were entitled to the rule; Mr. Henderrson who was concerned with him, having subscribed a certificate, according to the 43d rule of the practice, and filed the same in the clerk's office. If the court on trial, should think the rule was not proper or necessary, they will refuse to certify, and the party will be subjected to the expenses thereof.

The court said, that the practice had been regulated, in order to enter the proper rules in the clerk's office, where the attornies could not apply to the court. They certainly notwithstanding the view had been entered, had a control and superintendence over all rules and would exercise it. We have tried the suit, and are perfectly satisfied there is no boundary to be ascertained. It will be too late to correct the evil after the trial has been had, and injustice done. What will it avail the plaintiff that the defendant is condemned to pay the costs of the view? The certificate here has been given without due consideration; and such matters will be narrowly watched.

Let the rule for the view be discharged, and the defendant pay the costs thereof.

Lessee of GABRIEL PETERSON, WILLIAM TUCKER and ANNE his wife, JOHN CHURCHFIELD and CHRISTIANA his wife, *against* GEORGE LOGAN.

An original ancient letter from an assistant to the deputy surveyor of the district, indorsed by him, and found among the office papers, mentioning that he had received an order from G. A. for a survey made for him, allowed in evidence as a receipt for surveying fees.

Where a person claiming an application, asserts that G. C. presented him with it, an original memorandum of G. C. that he had the lands under his care for another, admitted in evidence.

EJECTMENT for lands in Springfield township.

The sole question was, who was entitled to an application entered in the name of Lawrence Peterson on the 4th November 1766, and to the survey of 441 acres thereon in 1767.

A person of that name lived about the house of George Croghan, not far distant from the premises, who said that Croghan had given him the location for his services. He was a poor man and occupied himself in hunting, removed to Westmoreland county, and there died. The lessors of the plaintiff claimed as his heirs.

The defendant claimed under George Armstrong. In order to show his interest in the location, a letter from Robert M'Kinzie, an assistant of Richard Tea, the surveyor of the district, directed to Tea, dated 2d November 1767, mentioning the application in the name of Peterson, and that he made a survey thereon and other surveys for Armstrong, for the surveying fees whereof he had received an order, and that he had charged him only 20s. for making each survey, was offered in evidence by the defendant. The letter was proved to have been found amongst the office papers of George Woods, late deputy surveyor, at Bedford, and was indorsed in the handwriting of Tea, as an original.

The same was accepted to by the plaintiff's counsel.

The court said, it bore every appearance of an ancient original paper, and was found in the office of the district surveyor. M'Kinzie had been dead many years, and Tea now was disqualified from giving testimony. Was it not tantamount to the assistant's receipt for the surveying fees? It was an acknowledgment of taking an order in payment; and shows at whose instance and expense the survey was made. The letter was read in evidence.

The premises in question were called "Turkey Hill." To invalidate the assertion of old Peterson, that Croghan had presented him with the application, an original memorandum of Croghan, of lands under his care, without any date, containing amongst others

the following entry: "One tract. Col. George Armstrong. Turkey Hill. Run out," was offered in evidence and admitted by the court, as repelling the declarations of Peterson, but for no other purpose.

One William Winton first seated himself on the land in 1773, and conveyed his improvement to the defendant 21st March 1780, who had since resided on it.

Old Peterson had a small cabin on other lands about 22 miles distant. He often hunted over this tract in question in 1767 and 1768, with a witness who was produced, but never claimed it in his hearing, though he spoke to him of his distant cabin. It was publicly spoken of in the neighborhood, as gentleman's land, and claimed by Armstrong, and persons under him.

The plaintiff suffered a nonsuit.

Messrs. C. Smith and Brown, *pro quer.*

Messrs. Hamilton and Watts, *pro def.*

Lessee of MATTHIAS SHIRK *against* JOHN VANNEMAN.

A witness may be admitted, unless directly interested in the event of the cause, or can give the verdict in evidence in his own favor in a future suit.

EJECTMENT for lands on the Frankstown Branch of Juniata. The title turned out as follows:

Joseph Bell obtained a warrant in 1755, for 100 acres; and John Armstrong, esq. obtained another warrant for 200 acres on Juniata, adjoining and below Alexander Lowrey, in 1762, on which latter warrant he executed a survey of 449½ acres in the same year; but finding that the earlier warrant of Bell called for the lands, he agreed to divide the survey equally with him; and Thomas Smith, esq. accordingly did divide the same by his order on the 25th April 1775, John Stephens, the son in law of Bell choosing the upper tract. Bell having vested (as it was said) Stephens with his right, the latter entered into an agreement with John Sensenigh, and sold him his tract for 1000£. on the 16th December 1777, and received from him 860£., which was indorsed on the articles. In the fall of 1777, the settlers at Frankstown were driven off by Indian ravages and did not return till 1784. In 1789, the defendant purchased from Armstrong the one moiety of the survey of 449½ acres, whereby he got into possession of the other moiety. A judgment having been entered in Bedford county on the 26th February 1780, against Sensenigh, the lands in controversy were afterwards

duly seized, condemned and sold, and afterwards on the 20th November 1793, duly conveyed by the sheriff to Henry Weaver, who conveyed the same to the lessor of the plaintiff.

Stephens being dead, the other heirs released to his son John Stephens, jr. on the 1st December 1797, and he on the 12th December 1797, conveyed to the defendant.

The deposition of the aforesaid John Sensenigh, taken under a rule of court, proving that he had executed a bond to Stephens the elder for 140*l.* the residue of the consideration of the premises, which he had afterwards paid, and the same was indorsed thereon by way of receipt, but that the same bond was casually lost: was offered in evidence on the part of the plaintiff, and excepted to.

The defendant's counsel admitted, that Sensenigh was a competent witness, to prove his having given a bond for the 140*l.*, but not to show that he had discharged it. The verdict in this suit might be given in evidence in a subsequent action brought on the bond by the representatives of Stephens. If a verdict be had on the same point and between the same parties, it may be given in evidence, though the trial was not had for the same lands. *Gilb. Law Evid.* 29. If a verdict be given against the defendant on the same point, though another party were plaintiff, yet in some cases it may be given in evidence, because the defendant in the former cause had a liberty of cross examination. *Ib.* 32. One who has no prejudice by the verdict can never give it in evidence. *Ib.* 34. *Hard.* 472. By the sale of the heir to the defendant, he becomes a privy to the contract between the ancestor and Sensenigh, and no verdict shall be given in evidence, but between such who are parties or privies to it. *Bull.* 232. A verdict with the evidence given in an action by the common carrier for goods delivered to him to be carried, may be given in evidence in another action brought by the owner against the carrier for the same goods. *Ib.* 243. As Sensenigh therefore may receive an eventual benefit, by swearing that he had paid the 140*l.*, his testimony on that head shall not be received.

E contra for the plaintiff, it was insisted, that in no shape whatever could this verdict be given in evidence in any future suit against Sensenigh. It is a settled rule, that no one can take benefit by a verdict that had not been prejudiced by it, had it gone contrary. *Gilb. Law Evid.* 33. He neither gains nor loses, in the event of the plaintiff's success, or miscarriage in the present action. The plaintiff derives a title through him by act of law,

under a sheriff's sale, and he is entitled to a credit on the judgment for the amount of the sale. Great allowance must be made for the want of title papers in the case of sheriff's vendees, otherwise injustice must arise. The bare possibility of an action being brought against a witness, is no objection against him. 1 Term Rep. 163-4. Different underwriters may be witnesses for each other on the same policy. 3 Term Rep. 27. The inclinations or wishes of witnesses go strongly to their credit, but not to their competency. *Ib.* 310. In an action by an indorsee of a bill of exchange against the acceptor, the latter may call the payee as a witness, to prove that the bill was void in its creation. 7 Term Rep. 601. The correct rule is laid down by *Ld. Kenyon*, that "no objection can be made to the competency of a witness, upon the ground of interest, unless he is directly interested in the event of the suit, or can avail himself of the verdict in the cause, so as to give it in evidence on any future occasion in support of his own interest." *Ib.* 62. Adapting this rule to the testimony offered, it is confidently presumed to be admissible.

Yeates, Justice. I cannot see how the verdict in the present cause can be received in evidence in any suit hereafter to be brought against *Sensenigh*, by the representatives of *Stephens the elder*. Neither he nor they are parties hereto, and have not the benefit of a cross examination. To each of them it is *res nova, inter alios acta*. Nor can *Sensenigh* by any possibility, either gain or lose by the event of this action. The rule laid down by Lord Chief Justice, *Kenyon* fully settles the point. Reliance has been placed on the case of the carrier cited from *Bull. Ni. Pri.* 243. There the evidence given by the carrier, against the wrongful holder of the goods, with the verdict obtained by him, were again received in evidence against the carrier, when the owner sued him for the same goods. It was strong proof against him that he had the last plaintiff's goods. It amounts to the carrier's confession in a court of record. But are the two cases parallel? If *Stephen's* executors or administrators sued *Sensenigh* on this bond for 140*l.*, could the latter give the verdict in this cause in evidence, and show that by his testimony, the bond had been proved to be fully discharged? The absurdity is too gross to be pressed for one moment.

Indeed, it seemed almost unnecessary to determine the present question. It is agreed, that the deposition may be received, to show that *Sensenigh* executed a bond for the balance of the consideration money, pursuant to the articles. If that is proved,

an equitable estate would vest in Sensenigh under the agreement, which would pass by the sheriff's sale, though if the bond remained unpaid, the premises might be chargeable with the payment thereof.

Brackenridge, J. Arguments respecting testimony are a delightful part of the practice of law; they show the good generalship of the contending counsel.

The plaintiff claims under an agreement with Stephens, in equity. The defendant holds under a conveyance from his heirs, at law. Sensenigh is liable for the money on the bond, in all events, if it has not been paid. Admitting that in a suit on the bond, the verdict here might be given in evidence, by Sensenigh, still it would be but *prima facie* evidence, that the money was paid; and it might be repelled by showing, that the verdict was founded in part on the testimony of the party himself. The radical principle respecting verdicts, is that they may affect the interest of the witness or party.

The deposition was read in evidence.

It was then objected by the defendant's counsel, that the plaintiff could not succeed, unless a conveyance from Bell of his warrant right to Stephens was shown.

To this the plaintiff's counsel, answered, that they also claimed under Armstrong's survey and the consequent possession of Stephens under the agreement with Bell. Besides, a grant from Bell may be presumed, from his non-claim and acquiescence since 1775. The defendant also claims under a conveyance from the heirs of Stephens, and shall not now be admitted to disaffirm that right.

The court said, that this objection in the mouth of the defendant, who held under Stephens's title, against the sheriff's vendee, came with an ill grace from him. The jury would however weigh all the presumptions, and circumstances attending the case.

The plaintiff obtained a verdict without further controversy.

Messrs. C. Smith and Henderson, *pro quer.*

Messrs. Duncan, Walker and Allison, *pro def.*

Lessee of ROBERT STEWART *against* WILLIAM RICHARDSON.

A second new trial awarded, after trial by a special jury and view without costs, improper evidence, which was afterwards overruled by the court, having been disclosed to the jury on the view.

EJECTMENT for lands in Franklin township.

This cause had been tried by a special jury and view in May last, in this court, before Smith and Brackenridge, justices, when a verdict passed for the plaintiff, and the court awarded a new trial.

It was again tried by another special jury and view, and a verdict again given for the plaintiff, after the jury had staid out ten hours.

A motion was made for a second new trial, on the ground that the lessor of the plaintiff had shown to the six jurors on the view the deposition of Richard Neave, in the absence of the defendant which had been afterwards overruled in evidence on the trial.

This fact being verified by the oath of James Wilson, one of the jurors on the view, and assented to by the others, the court without hesitation, awarded a second new trial, without costs ; and there being no question of boundary, the rule for a view was discharged, on motion on behalf of the defendant.

Messrs. Hamilton and Cadwalader, *pro quer.*

Messrs. Duncan and C. Smith, *pro def.*

Lessee of SAMUEL MOBLEY, DENTON MOBLEY, WILLIAM MOBLEY, ROBERT CUNNINGHAM and MARGARET his wife, and SUSANNAH MOBLEY *against* CHRISTIAN OEKER.

Improvement rights are equitable claims, which may be affected by the conduct of the improver's widow, during the minority of his children.

The 5th section of the limitation act of 26th March 1785, is binding on infants where there has been no possession of lands improved for seven years next before action brought.

EJECTMENT for 214 acres on Clover creek, in Woodberry township.

The lessors of the plaintiff founded their pretensions on an improvement made by their father, Ezekiel Mobley, on lands adjoining. He settled on those lands in 1774 or 1775, erected a small house with a garden, cleared 15 or 20 acres, and begun 2 or 3 acres for meadow. He claimed the lands from Clover creek, southerly to some marked trees between him and Michael Crydor, 363 perches distant. The good land extended easterly from the creek, about 125 perches to Tussey's mountain. He sold his claim to one tract, west of the creek ; and also another tract north of his improvements, which fell back to him.

The settlers were driven off by the Indians in 1777, and Mobley among the rest. He went to Maryland and there died.

His widow returned to the lands in 1785, with her five children, the eldest about 15 and the youngest about 2 years old; and was assisted by her brother, William Philips, with corn and provision. After some time she disposed of the tract north of the improvements which had fallen back to her husband, for the maintenance of the family; and being alarmed about their right to the tract whereon they lived, agreed in behalf of herself and family with her brother the said William Philips, that if he would secure to them 200 acres by an office right, he might have the residue for himself. She afterwards received a horse and cow as a further consideration for the improvement claim.

Philips accordingly took out warrants and obtained surveys of 200 acres in the name of Susannah Mobley, and 214 acres and 90 perches for himself, which he afterwards patented and sold to the defendant for a valuable consideration. No improvements whatever were made on the lands in dispute, until after the survey was made for Philips in 1793.

Before the parol evidence was gone into, the defendant's counsel objected, that the plaintiff was barred by the act of limitations of 26th March 1785, § 5, (2 Dall. Laws, 282,) there having been no quiet and peaceable possession of the premises within seven years next before bringing the action.

To this it was answered, that the widow had always been in the possession of the improved part of the lands, since the inhabitants returned to their settlements; and that if she was deprived of the possession of any part, it arose from the fraud or management of Philips, or her mistake in believing that an office right was indispensably necessary to hold the lands.

The court said, it was morally impossible to form any judgment, whether there had been an abandonment of the premises or not, so widely did the counsel differ in their statements, until the evidence was fully heard. The legal objection might afterwards be taken up and decided on.

The plaintiff's counsel then excepted to giving evidence of any contract or sale by the widow respecting the improvement claim. No act which she could do, could affect the rights of the children in their minority, in lands claimed by improvement, and ascertained on one side by a marked line; and for this was cited 2 Dall. 205. *Duncan's lessee v. Walker*.

The court said, improvement rights were equitable claims which

might be fortified by the acts of a widow during the minority of her children, by pursuing and continuing the first settlement. So also might they be abandoned and forfeited by her neglect. Evidence was equally applicable and revelant in both cases. It was impossible to lay down any general rule on the subject. Every case must depend on its own peculiar circumstances. The effect of the evidence must be judged of, after it has been received.

After the evidence had been gone through, the court said, that they discovered nothing unfair or inequitable in the transaction of Philips with the widow. There were many years previous to 1791, when improvement rights were deemed to stand on a precarious footing. While this opinion generally prevailed, there was no impropriety in a widow's securing at least part of the land claimed. And in this instance, one of the adjoining tracts had been transferred by the improver in his life-time, and two others had been disposed of by the widow after his death. The claim went to an unreasonable extent, and 200, acres had been secured to the family.

It was agreed by the court and all the counsel, on the question being made, that the 5th section of the limitation act of 26th March 1785, extended to and was binding on infants, where there had been no possession of the lands held under the improvement, for seven years next before the action brought. The preceding section contains a proviso in favor of infancy, coverture, &c., but here it is only in favor of those who have been driven from their possessions by force or terror, &c. and the previous part of the law runs thus:—"unless he, she or they, or his, her or their ancestors or predecessors, have had the possession," &c. The law is general in its nature, and binds every member of the community, "for the quieting of estates and security of property." Vide Co. Lit. 246, a Plowd. 364. Godb. 365. 9 Vin. Abr. 376.

The plaintiff suffered a nonsuit.

Messrs. Duncan and Walker, *pro quer.*

Messrs. Hamilton and Henderson, *pro def.*

JOSEPH DUNCAN Administrator of DINAH DUNCAN deceased, *against*
Administrators of DANIEL DUNCAN deceased.

The personal estate of a mother being a widow, and dying intestate, under the law of 1705, is subject to the same distribution as that of a father.

The following case was stated for the opinion of the court, at the last Circuit Court at Carlisle.

The said Dinah Duncan was the widow of the aforesaid Daniel, and died on the 4th January 1791.

It is agreed, that the defendants having made distribution of the estate of the said Daniel Duncan among his representatives, that distribution shall stand as far as it has been made; and that the plaintiff shall only claim his share of his mother the said Dinah's estate, as her eldest son. And it is submitted to the court, to determine whether the said Joseph Duncan, as eldest son of the said Dinah, is entitled to two shares of her estate, she having died before the passing of the late act of distribution; and upon the court's determination of that question, David M'Knight, John Arthur and William Alexander, are appointed referees to settle the account between the parties; but the defendants not to be accountable to the plaintiff, further than his distributive share of his said mother's estate.

Mr. Duncan for the defendants, insisted, that the 2d section of the acts of assembly "for the better settling of intestate's estates," only respected the case of a father dying intestate of one capable of having a wife according to the provisions in the enacting clause; and that the pronouns him and his, were not applicable to a mother dying intestate. 1 Dall. St. Laws append. 44. In *Holt v. Frederick*, 2 Wins. 356, it was decreed, that the act of distributions was grounded on the custom of London, which never affected a widow's personal estate; and if a mother being a widow, makes advancements to a child and dies intestate leaving other children, the child so advanced, shall not bring what he received from his mother into hotchpot.

Yeates, J. said, that he thought this point had been at rest, since the decision of the case between the lessee of *Eshelman et al. v. Hoke*, December term 1799, which settled the question as to the mother's lands; that the uniform practice had been to distribute the personal property of widows, who were mothers, in the same manner as that of fathers, under the law of 1705; and that the words him and his, included as well the female as male sex, by the fair rules of construction. Vid. 2 Vez. 213.

Brackenridge, J. said he had not fully made up his mind on the subject. The determination was therefore postponed. But in the term of September following, the case being stated to Shippen chief justice, and Smith justice, the court were unanimously of opinion, that the plaintiff was entitled to two shares of the surplusage of the personal estate of his mother, as her eldest son.

Mr. Watts, *pro quer.*

SEPTEMBER TERM, 1801.

CORAM—SHIPPEN, CHIEF JUSTICE, YEATES SMITH, AND BRACKENRIDGE,
JUSTICES.

Lessee of ELIZABETH HAUER *against* PETER SHITZ.

A father devises to his son F. his heirs and assigns certain lands subject to the payment of 2300l. in instalments to his son P., and to his son P., his heirs and assigns other lands; but in case F. or P. shall die under 21 or without issue, then and in that case he gives the share of the son so dying unto his other son in fee; and in either case, the survivor of his sons shall then pay to his daughter E. 500l. out of the last payments of the instalment. Testator by his codicil orders that F. shall not sell his lands devised to him till the age of 30 years, and then he may do with them as he pleases. F. attains 21, but dies before 30 without issue intestate; the devise over to P. is good as an executory devise. A devise may operate in different ways according to subsequent events.

EJECTMENT for lands in Dauphin county, on trial, whereof the following special verdict was taken:

The jurors find, that Peter Shitz, the father of the lessor of the plaintiff and of the defendant, was seized in his demesne as of fee, of the lands and tenements in the declaration of ejectment stated and mentioned; and that on the 8th April 1795, he made his last will and testament as follows:

"In the name of God, Amen. I, Peter Shitz, of &c. do make and publish this my last will and testament in manner following, that is to say; *Imprimis*, it is my will, and I do hereby order and direct, that all my just debts and funeral expenses be fully paid and satisfied by my executors hereinafter named and appointed, as soon after my decease as possible. Item, I give and bequeath to my son Francis Shitz, all that my plantation and two tracts or pieces of land, the one of them whereon I now live, bounded, &c., containing about 360 acres, be the same more or less, and the other of the said tracts, bounded, &c., containing about 25 acres, be the same more or less, to have and to hold the said two tracts or parcels of land unto my said son Francis Shitz, his heirs and assigns forever subject to the payment of 2300l. lawful money of Pennsylvania in gold and silver coin, which said sum it is my will, and I do give the same unto my son Peter Shitz and to his heirs and assigns forever, and to be paid in manner following, to wit: my said son Francis Shitz shall pay at the expiration of one year after my decease, the sum of 100l. and then the sum of 100l. for three years successively, and then the next year the sum of 500l. and then the next year the sum of 150l. and then so on the sum 150l. yearly and every year, until the whole sum of 2300l. shall be fully paid. I also give and bequeath unto the said Francis, with the said plantation, and to his heirs and assigns, four horses, &c. &c. Item, I give and bequeath to my wife Catharine, during the

term of her natural life, my house and lot she now lives in, in the town of Heidelberg, and also all the money and effects which is mentioned and contained in a certain article of agreement, dated 19th February 1789, and which I have therein promised and agreed to pay and deliver her, during all the term of her natural life ; she paying the taxes and ground rent thereon to become due, and which said money in said agreement mentioned 24*l.* yearly shall be paid her on the first day of May yearly during the term of her natural life, by my said son Francis Shitz, and which my said plantation shall always be subject to. Item, it is my will, that my executors shall immediately after my decease put 600*l.* of my money out at interest; and it is my will, and I do hereby order and strictly direct, that my said executors shall yearly and every year during the term of the natural life of my said wife Catharine, pay unto her the full interest of the said sum of 600*l.* which said yearly interest together with what I have herein before mentioned and given to her, shall be in lieu and full satisfaction of her thirds and dower in my whole estate. Item, I give and bequeath to my daughter Elizabeth, now the wife of John Hauer, the sum of 1000*l.* lawful money of Pennsylvania, (in gold or silver coin) nevertheless to be deducted out of the said 1000*l.* what I have already given and advanced my said daughter Elizabeth and son-in-law John Hauer, which said money shall be paid my said daughter Elizabeth in manner following, to wit : 300*l.* thereof, (besides what they now have) within six months after my decease, and then the sum of 100*l.* yearly and every year, until the whole sum shall be paid. Item, it is my will, that my plantation situate in Heidelberg township, bounded, &c. containing about 80 acres, be the same more less, my said executors shall sell the same, either at private or public sale, as they may see best; and I do hereby empower and authorize them to make a good and sufficient deed of conveyance for the same unto the purchaser thereof, his or her heirs and assigns forever, and the money arising from the sale of the said plantation, shall go towards the payment of the aforesaid 1000*l.* which I have given to my said daughter Elizabeth. But in case my said daughter Elizabeth shall depart this life before the said 1000*l.* be fully paid her, then it is my will, that my said executors shall retain the rest in their hands, and put the same to interest for the children of my said daughter Elizabeth, until they be of the lawful age of 21 years, and it shall then be divided between them, share and share alike. Item, I give and bequeath to my said son Francis Shitz the half part of

my clothing, &c. &c. and the other half part thereof, together with the rest and residue of my moveable goods and effects and money whatsoever, and wheresoever the same may be, and not herein before given and bequeathed, it is my will, that my said executors shall make a public vendue of the same, and the money arising from the same, I give and bequeath unto my said son Peter Shitz, his heirs and assigns forever. Item, after the decease of my said wife Catharine, I give and bequeath the said sum of 600l. (which my executors shall so have put to interest) unto my said two sons Francis and Peter Shitz, to be equally divided between them, share and share alike; also after the decease of my said wife Catharine, I give and bequeath to my said two sons Francis and Peter Shitz, my house and lot of ground, wherein my said wife Catharine now lives, to hold to them my said two sons Francis and Peter, their heirs and assigns forever. But in case my said son Francis Shitz shall die under the lawful age of twenty one years, or without lawful issue, then and in that case I give and bequeath to my said son Francis' share in my said whole estate, unto my said son Peter Shitz, and to his heirs and assigns forever. And in case my said son Peter shall die under the lawful age of twenty-one years, or without lawful issue as aforesaid, then in that case, I give and bequeath my said son Peter's share in my said whole estate unto my said son Francis Shitz, and to his heirs, and assigns for ever. But in either case the survivor of my said two sons Francis and Peter shall then pay unto my said daughter Elizabeth or her heirs, the sum of 500l. lawful gold and silver money, but to be taken out of the last payments of my first mentioned plantation. And lastly, I do hereby nominate, make, constitute, and appoint my good and trusty friends and neighbors Henry Sheaffer, esq. and Joseph Bomberger, executors of this my last will and testament, hereby revoking all former wills, &c. In witness, &c."

This jurors further find, that the said Peter Shitz the father, on the 10th day of April, in the same year, did make a codicil to his said last will and testament as follows:

"I Peter Shitz, of &c. do this 10th day of April 1795, make and publish this codicil to my last will and testament in manner following, that is to say: I give unto my son Francis Shitz, for his use and benefit only, my servant man and servant boy, for all the time of their servitude, with the indentures and papers relating to the same; but my said son Francis shall give and pay my said servant man and boy all the articles and things, which I am otherwise

bound in the said indenture to give them ; and because my said son Francis gets my said servants, he shall, when my son Peter becomes of the age of 21 years, give him my said son Peter one of his best horses (excepting it be a particular mare or stone horse) and without any charge for the same to my said son Peter. And I do hereby order and particularly request, and do not allow my said son Francis Shitz to sell any part of the land, which I have in my said will given him, until he arrives at the age of thirty years, and then he may do with the same as he pleases. In witness, &c."

And the jurors further find, that the said Peter Shitz the father died, leaving the said Francis, the said Peter the defendant, and the said Elizabeth the lessor of the plaintiff, his only children. That the said Francis entered into and took possession of the lands and tenements in the said declaration of ejectment mentioned ; and being so thereof seized died without lawful issue, but after he was above the age of twenty-one years, intestate ; and that the said Francis was born on the 1st April 1775, and was killed on the 28th December 1797.

The jurors aforesaid do further find, that the said Elizabeth Hauer, the lessor of the plaintiff, is the sister of the whole blood of the said Francis, and that the said Peter the defendant, is the brother by the half blood of the same Francis, he the same Peter being the son of the said Peter Shitz the father, by another venter. They also find the lease entry and ouster as laid in the declaration. If the court shall, &c.

This special verdict was argued several time by Messrs. C. Hall and C. Smith for the defendant, and by Mr. Duncan for the plaintiff, in March term 1800 ; and again by Mr. Smith for the defendant, in December term last ; and by Mr. Ingersoll for the defendant and Mr. E. Tilghman for the plaintiff, at the last March term.

The defendant's counsel made three points. 1. The disjunctive word or, in the clause of the will, which directs the limitation over of the premises, in case of Francis dying under 21, or without lawful issue, shall not be read as and, in the conjunctive, as this would violate the intent. 2. The limitation over to Peter is not too remote to take effect. 3. Even admitting the limitation over to be on an indefinite failure of issue, Francis having a power to defeat the subsequent devise to Peter, on his arriving at the age of 30 years, the latter estate may well stand, and is not within the mischief or reason of perpetuities.

1. It is an acknowledged principle, that the true intention of

tator shall guide the construction of his will. The primary objects of the testator's bounty were his two sons. To each of them he gives plantations, and expressly directs by two different clauses, that if either shall die under 21, or without issue, the share of the son so dying shall go to the survivor. By his codicil, he disallows his son Francis, from selling the lands devised to him till he became 30 years of age. When the will was made, Francis was ten days beyond his twentieth year of age. There is a strong reciprocity of interest in the two sons, in the event of either dying before 21 or without issue. If Elizabeth the sister, should be supposed to succeed to her brother Francis, in preference to Peter, the result would be, that the 500*l.* devised to her on the contingencies expressed in the will, could never be raised, though the surviving brother is charged in clear terms with the payment of that sum out of the lands in dispute. The testator expressed a jealousy of John Hauer, the husband of Elizabeth, by directing that if she died before the full payment of the 1000*l.*, the residue should be put to interest for the benefit of her children. But, by the plaintiff's construction if her husband survived her, he would become tenant by the curtesy of the premises. According to that construction it must be supposed, that the testator contemplated within a shorter period than twelve months, the several events happening of his own death, the marriage of his son Francis, and of his having issue? Can Elizabeth possibly take the lands, out of which a sum of money is payable to her in the year 1810, when the payments directed to be made by Francis would cease? On examination of all the cases which can be produced, it will be found, that disjunctive words in wills are never taken in the conjunctive, unless where it is to effectuate the manifest intentions of testators. *Ld. Chief Justice Holt* says, he does not know how he could transpose words which were good sense. 1 *Salk.* 237. To effectuate the general manifest intent of a testator, a necessary implication may control the words of a devise. 1 *Burr.* 50, 51. We must inquire what is the general intention of a testator, and whether he has used words sufficient to carry that intent into execution. The legal form of words may be controlled by the context of the will; but we ought not to reject the legal meaning of those words, unless we are clear that in so doing, we give effect to the devisor's intention. 3 *Term Rep.* 490-1. The intention of a testator must be collected from the whole of the will, and founded on the writing itself. Particular cases serve rather to obscure and confound, than to illuminate questions of this kind. 3 *Burr.* 1542. The meaning of a testator must be collected from his words; when those are ambiguous, the will should be expounded according to the law, so that

there shall be no prejudice. Cro. El. 444, 748. The words of a will shall be construed to effectuate the meaning of the testator, though technical terms are used, if the rules of law are not violated. 1 Bos. and Pull. 256, 257, 261. No technical form of words is necessary in wills to convey the testator's meaning. The meaning must be collected from the will itself, by attending to the several parts of it, and comparing and considering them together. 2 Burr. 770. 3 Term Rep. 86. 4 Term Rep. 297. The statute only requires a will in writing, but no technical words; it is immaterial what words are made use of. All the circumstances and clauses are to be united and taken together, in order to collect the intention. 3 Burr. 1625. 2 Wils. 324. Cases on wills have no great effect with the court, unless they agree in every circumstance with that in question. 3 Wils. 143. There is no magic in particular words, further than to show the party's intentions. Where the sense requires it, the court will construe the word or, as and, and *vice versa*. 3 Term Rep. 473. If an use be limited to certain persons, until A shall come from beyond sea and attain his full age or die, if he doth come from beyond sea, or attain his full age, the use doth cease. Co. Lit. 225, a. Cro. El. 269, 270. Lord Vaux's case. It may fairly be inferred from the will in question that the testator intended his son Francis should not marry before he was of full age, as in the case of Hilliard v. Jennings. Carth. 514. 12 Mod. 276.

2. The case of Pells v. Brown, Cro. Jac. 590, is said to be the magna charta of the law, on the subject of executory devises. There the testator devised to B. his son, and his heirs forever, and if he died without issue, living W., then W. to have those lands, to him and his heirs forever; and the limitation ever was held good as an executory devise. S. C. 2 Fearne 18, 51, 69, 92, 93, 208, 391. The will before the court cannot be distinguished from this case in principle. In the clause under consideration, the testator makes use of the words then and in that case; and directs, that in case of either of his sons dying under 21, or without issue, the survivor shall pay to Elizabeth 500l., to be taken out of the last payments of his first mentioned plantation. *Then* is an adverb of time. 7 Term Rep. 557. When the word survivor, is used, the will speaks personally, and does not mention heirs or assigns. In effect, the words are tantamount to saying, as follows, in direct terms; "When my surviving son Peter succeeds to the estate of his brother Francis on his death without children, he shall pay to his sister Elizabeth 500l., but this time shall not exceed the year 1810."

So that the event must necessarily, happen, within the compass of the lives of the sons ; and the payment of the money is fixed as a cotemporary act with the taking of the land. In such a case there cannot be the remotest danger of a perpetuity.

Under the old decisions, it was necessary that express terms should be inserted to limit and control the operation of words which in themselves would be construed an indefinite failure of issue. But the court will now lay hold of any circumstances, which show the unequivocal intention of the testator, to use the words in a more confined sense, when the limitation over should take place. Thus in *Porter v. Bradley*, 3 Term Rep. 143, the words assigns forever, in the first limitation, and leaving no issue behind him, were held strongly to indicate the testator's intention. 2 Fearn 206, 209. So in the case of *Wilkinson v. South*, 7 Term Rep. 555, 557, the words then after his descease showed, that the estate should vest in B after A's death. And in *Sheere's lessee v. Jeffery*, the words and leave issue were, on held to mean a failure of issue of T. F. at the time of his death, the remainders over being life estates only. *Ib.* 595. Even the expressions "in default of such issue," may operate as a *descriptio personæ*, as applied to real estates, where such construction favors the general intention of the deviser, and its application is equivocal, for then it shall be construed by relation to mean issue of the nature intended. 3 Term Rep. 484. 2 Fearn 212. Trust of a term to arise on a contingency, 1st, That A and B shall die without leaving issue male, or 2d, That such issue male shall die without issue, is good, in case A and B have a son, who dies without issue in the life-time of the survivor. 2 Bl. Rep. 704. The words dying without leaving issue, shall have the same construction as the words dying without issue, in the limitation of real estates, wherever the limitation over can take effect under that construction. It is founded on the established doctrine in 2 Saund. 380. 4 Mod. 284. *Purefoy v. Rogers*. 2 Fearn 200. That a limitation over shall never operate as an executory devise, where it may take effect as a remainder, may be overruled by a contrary intention of the testator, contradicting the legal construction of the words of limitation. The intent of a testator shall always prevail, if not contrary to law ; which means, if the limitation be such as the law allows ; but does not mean, that the words shall be taken in such sense as the law imposes on them. *Ib.* 205, 206. The principal, that the law will not suffer a man to create limitations contrary to its own rules, is applicable to the nature of the estates, and not to the construction of the words. If his intention is lawful, though he uses barbarous or inapt words, the law will construe them into words proper and sufficient, according to that

intention, which appears in his will. 2 Atky. 246, 570, 580. 1 Vex. 142, 146. Collect Jurid. 388, 9.

If the present object of dispute was a mere personalty, there can be no question, but the words used would be confined to Francis's dying without issue, at the time of his death. Here there was both realty and personalty, to go over in the event of either son dying under 21, or without issue. Can the lands pass in one direction, and the personal property in another? Must not the plain intention of the testator prevail in either case? The distinction in the English courts between real and personal estates, is not applicable to our local situation, lands here being liable to the payment of debts. Among many cases on this head, may be cited *Target v. Gaunt*. 1 Wms. 432. *Atkinson v. Hutchinson*. 3 Wms. 258. *Penbury v. Elkin*. 1 Wms. 563. *Nicholls v. Skinner*. Prec. Cha. 528. 2 Equ. Ca. Abr. 146. *S. C. Hughes v. Sayer*. 2 Wms. 534. *Forth v. Chapman*. 1 Wms. 667. *Keily v. Fowler*. 6 Bro. Parl. Cas. 309. *Lyde v. Lyde* 1 Term Rep. 593. *Richards v. Lady Bergamenny*. 2 Vern. 324. *Daintree v. Daintree*. 6 Term Rep. 312.

The doctrine of executory devises from small beginnings, has spread greatly for family purposes. Originally they went no further than mere terms. 8 Co. 95. 10 Co. 48. The first executory remainder of a term was held good. 19 Eliz. 3 Cha. Ca. 33. Such devises have since been much improved on; as in *Pells v. Brown*. Cro. Jac. 590. *Duke of Norfolk's case*. 3 Cha. Co. 1. And in the late remarkable case of *Thellusson v. Woodford*. 4 Ves. jr. 227.

3. The great objection to remote limitations, is, that they may create perpetuities. Of this there can be no danger in the present instance; because Francis might have defeated the estate limited over, when he became of the age of thirty. A man gave his estate to his wife, so long as she should remain unmarried; but if she married, then to his daughter; and in case the daughter should die without leaving issue, then to J. S. The daughter died without issue in the mother's life, who still remained a widow; held that the reversionary interest belonged to J. S. on the death of the daughter, without issue then living. 6 Bro. Parl. Cas. 354. The court always inclines to support the limitation over, if it can be done. They will lay hold of every circumstance to support the intention of the testator. 2 Vez. 118. Proviso in a will, that in case the devisee should come into possession of the family estate, the trustees should stand seized of the devised estate, to the use of the next person in remainder, is valid. 2 Bro. Cha. Rep. 215. A younger

brother devises his estate to his eldest son for life, remainder to trustees to support contingent remainders, remainder to his first and other sons in tail; provided if the larger estate should descend from the elder branch of the family to his eldest son, his own estate should go to the younger branch of the family; that event did happen, and the remainder over was held good. 4 Term Rep. 13. On failure of the first limitation, the second may take effect as an executory devise, where its taking effect or not, depends on the act of the owner of the fee, which precedes it. *Ib.* 440. In 2 Fearne 107, 108, the law on this subject is summed up. Executory devises are confined by the reason of perpetuities. Whenever the previous estate can be barred, the reason ceases; and it tends no more to a perpetuity, than an estate tail with a remainder over does.

The plaintiff's counsel contended, that on the whole of the will and codicil, it appeared, a clear estate in fee simple was devised to Francis, defeasable only, on the single contingency of his dying under 21. Consequently, he having attained that age, the lands in question vested in the lessor of the plaintiff, as his sister of the whole blood, on his dying intestate. That if the limitation over to the defendant was not too remote, (of which there was much doubt,) the contingency on which it was to take effect had not happened, the uniform rule of construction having restricted devises of this nature to the death of the party who took the first estate in his minority.

The premises in dispute were expressly devised to Francis, his heirs and assigns, subject to the payment of 2300*l.* to Peter by instalments, which would end in the year 1810. The clause in the codicil, as to Francis not selling the lands till he was 30 years of age, must be considered merely as recommendatory and not as imperative. Words of restraint in a devise, as "that the devisee should not sell," unless there is a provision, as a consequence of violation, operate only as recommendation. 1 Ves. jr. 483. It will not be pretended, that the thirty years mentioned in the codicil, were substituted in the place of the twenty-one years in the will. The restrictive clause would not have prevented Francis from devising the lands when he came of full age. But by the defendant's construction, Francis could not sell, even after his age of 30; and though he had suffered a common recovery, the title would continue in suspense, which is highly absurd! It cannot be disputed, that the codicil admits that the testator had thought he had given the lands to Francis in fee simple, by his will; though he might intend to impose terms on him by the codicil.

We find in the books, that words similar to the present, as to the limitation over, have come no less than twenty-seven times, before different courts of justice, and have received one uniform construction, that they form but one contingency. So far as rules of construction are rules of property, they will be as much regarded as other precedents, to fix the law. Adjudged cases of construction, have great weight. 1 Burr. 233. Unless courts are bound by authorities, as firmly as the Pagan deities were supposed to be bound by the decrees of fate, no lawyer would know in many instances, what to advise. Jones on Bailments, 46. They cannot legislate, but they can discover by their industry what their predecessors have done ; and Lord Kenyon remarks, that it was his wish and comfort to stand *super antiquas vias*, and he would servilely tread in the footsteps of those who had preceded him. 7 Term Rep. 668. Where the construction of a law has been long accepted and received as a rule of property, judges should acquiesce and determine the same way in a doubtful case ; though some may not be satisfied therewith, were the matter to be newly resolved. 1 Dall. 179. The court there say, John Hunter was the principal object of the testator's bounty, and if he had married and died before 21 years of age, leaving children, he certainly meant not that the estate should go from them. This therefore was an immediate gift to John, though he was not to have the possession till he come of age. All the cases support this judgment. Devises are governed by the intention of the testator. 16. 177. One uniform rule of construction of wills must prevail, let the objects of the will be proper or not. 4 Ves. jr. 329. Thellusson v. Woodford. By the first words in the will, Francis indubitably would take an estate in fee simple. But that estate might be defeated by his dying under 21 and without issue, according to our construction. An antecedent estate is given to him in fee simple, and it cannot be possibly conceived, that the father meant to disinherit the children of his son, if he died before 21, leaving issue. It must therefore be taken as one contingency, from a violent and necessary implication, which the court cannot resist.

In Holmes v. Meniel, Skin. 19, the case of Cain v. James, is cited. There, one gave lands to A and his heirs, and if A dies without heirs, of his body, that his sister should have 6000*l*. The words and if he die without issue, making that which was a fee simple to become a fee tail by implication, being a thing only for the benefit of him in remainder, shall never carry more than a bare remainder.

In Price v. Hunt, Pollex. 645, J. H. devised lands to his wife, till his son J. should attain 14, if his wife and son shall

so long live ; and in case his wife should die before his son's age of 14, he devises the same to his son J. and his heirs forever ; and in case his son should die before 21 or have issue of his body living, he devises the same to his wife for life, and after her decease to F. and his heirs forever ; the son attains 21, and dies without issue, his heir shall inherit. In *Framlingham v. Brand*, 3 Atky. 390. (but differently reported in 1 Wils. 140,) there was a devise of a house to R. and his heirs and assigns forever ; and in case he shall happen to die in his minority, and unmarried or without issue, to H. and his heirs ; it was decreed, that the estate should go over only on one contingency, of R's dying during his minority, and that the estate vested in him on his coming of age. Devise to his grand-son, his heirs and assigns, but in case he dies before he attains 21 or marriage and without issue, then over ; the grand-son attained 21 and died unmarried, his heir shall hold ; for all put together forms but one contingency ; it is not a condition precedent, but to destroy an estate before devised. *Barker v Suretees*. 2 Stra. 1175. This last case is very similar to that before the court, and is recognized as founded in reason, in 2 Fearne 391. Where there are two conditions to vest an estate, one will suffice. 2 Vern. 388. 1 Equ. Ca. Ab. 74. But where to divest it, both must concur. 3 Com. Dig. 44, n. Pollex. 645. We frequently in our law, see the disjunctive taken as the copulative, and the copulative as the disjunctive, in order to make the words stand with reason and the intent of the parties Plowd. 289. Thus, in *Read v. Snell*, 2 Atky. 643, or was construed and, to put a reasonable construction on a will. So in *Walsh v. Peterson*, 3 Atky. 193, where the words of the will agree with those under consideration, in all the material parts. P. gave two thirds of his real estate to his son, to hold to him his heirs and assigns forever ; but in case he dies before he shall attain the age of 21, or without lawful issue, then to the testator's wife, his heirs and assigns. The son died after 21 and without issue ; and Lord Hardwicke held it to be a vested estate in the son, on one contingency happening, and it shall go over to his heir at law, and not to the mother. So in *Wright v. Kemp*, 3 Term Rep. 473, cited by the defendant's counsel, the court will read *or* as *and* in order to effectuate the intention of the parties, as well in a surrender of copyhold premises, as in a will. In *Beachcroft v. Broome*, 4 Term Rep. 442, counsel refused to argue the case, where there was a devise to A. and his heirs ; but if he die without settling or disposing of the same or without issue, then over ; and the court held, that A. might settle the estate in his life-time, and defeat the limitation over. Where a testator devised lands to his son and heir, and if he died before 21, and without issue of his body then living,

remainder over, and the son survived 21, and then sold the land and died without issue; it was held, that he had a fee immediately, for the estate tail was limited to commence on a subsequent contingency. *Pow. Dev.* 254. Cites *Collinson v. Wright*, 1 Sid. 148. *Clache's Case*, *Dyer*, 330, 331, 354. A testator devised lands to his son, B. in fee, and other lands to his son C. in fee, provided, that if either of his sons should die before they should be married or before 21, and without issue of their bodies, then he gave the lands of the son so dying to the survivor; and it was resolved, that the sons took in fee, subject to a limitation to the survivor for life, in case of either dying unmarried, or under 21 without issue. *Hanbury v. Cockerell*, 1 Rol. Abr. 334. 2 *Fearne* 18, 19. Where an estate is to take effect on certain events happening, which afterwards do not take place, no estate passes. *Doo v. Brabant*, 3 Bro. Cha. Rep. 393. 4 Term Rep. 706. 2 *Fearne* 439. A limitation in a deed to the use of A. for life, with remainder to the first son of the body of A. lawfully issuing, and for default of such issue, to the 2d, 3d and other sons of A., and of the several heirs male of the bodies and body of all and every of such son and sons respectively issuing, gives an estate in tail male to the first son of A. *Owen v. Smith*, 2 H. Bla. 598.

Devise to A. for the use of B. till B attains the age of 21 and then to B. in fee; the fee vests immediately in B. *Denn v. Satterthwaite*, 1 Bla. Rep. 519. A Devise to trustees, till A. should attain 24, and when he shall attain that age, to him in fee, gives him a vested interest, which will descend to his heirs, though he die before 24. For otherwise if A. had left any issue, they would not have taken any thing under the will, which would be contrary to the testator's intention. Per Grose, justice, *Doe v. Lea*, 3 Term Rep. 41, 43, 44.

If Francis had left a child, it cannot be said, that there could be any competition between such child and the defendant in remainder. The child would take, on the ground of his father having a vested interest, whether he died under 30, or under 21 years of age. Such birth not having happened, cannot alter the legal operation of the words of the devise; because a will can never be construed according to events happening after the testator's death. 7 Term Rep. 534, *Doe v. Smith*. Wherein Lord chief justice Kenyon repeats the words used by Mr. Justice Wilmot in *Roe v. Grice*, 2 Wils. 323. Whenever a fee is created by positive words, it can only be defeated by words equally plain, or by necessary implication. 3 Term. Rep. 498. And the true rule of implications is said by Mr. Harvey, to be

where it is necessary to effectuate the manifest general intent of the testator. 3 Burr. 1574. We rely greatly on this, that an antecedent estate in fee simple was given to Francis, which was to go over to Peter, only on one contingency, that of his elder brother dying under 21 ; and we trust that no case can be shown, where a previous estate in fee has been given to the first devisee, with such a limitation over, that it has been determined such words form more than one contingency.

The chief disputes, as to the validity of limitations over, both as to realty and personalty, have been between the estates of the first devisee and the remainder man. In the latter, courts of justice will lay hold of any minute circumstances to confine the default of issue, to the want of issue living at the death of the first devisee. The cases of *Porter v. Bradley*, 3 Term Rep. 143, *Wilkinson v. South*, 7 Term Rep. 555, and *Sheer's lessee v. Jeffery*, *Ib.* 595, were determined on the peculiar penning of the will. No such words occur in the case before us.

A man may mean differently by the same words as applied to real or personal property. Thus, if he devises his house to A. without other words expressive of the extent of the estate, A. takes the property only for life ; but if he devises his horse to A. he takes the full complete interest therein. The case of *Forth v. Chapman*. 1 Wms. 663-7, is now become a land mark of property. The distinction between a devise of lands and personal estate is now perfectly ascertained. On a limitation of personal estate upon a dying without issue, the words are taken in their vulgar sense, that is, dying without leaving issue at the time of his death ; but on such a limitation of lands, the words are taken in a legal sense, and that is, whenever there is a failure of issue. *Cowp.* 411. *Denn v. Shenton*, 2 Fearn 194. *Sheffield v. Lord Orery*, 2 Atky. 289. *Atkinson v. Hutchinson*, 3 Wms. 261. *Lampley v. Blower*, 3 Atky. 397. *Stafford v. Buckley*, 2 Vez. 181. *Southby v. Stonehouse*, *Ib.* 616. *Williams v. Jekyl*, *Ib.* 683. *Exel v. Wallace*, *Ib.* 325. *Doe v. Perryn*, 3 Term Rep. 494. And in *Daintry v. Daintry*, 6 Term Rep. 312, Lord Kenyon discards the opinion which he had expressed in *Porter v. Bradley*, 3 Term Rep. 143. The distinction therefore will be considered as a sacred rule of property. The words " then and in that case " have been relied on, and then, is said to be an adverb of time, and to refer to the period of Francis's death. But the word then, in limitation of estates is not considered as an adverb of time ; but relates to the determination of the first limitation in the estate, when the contingency arises. 2 Atky. 311. The words then and when, do not amount to make any thing precede the settling of the re-

mainder. 3 Co. 21, a. They only denote the time when the remainder shall take effect in possession ; for when these adverbs refer to a thing, which must of necessity happen, there they make no contingency. 3 Term Rep. 42.

On the last argument, the plaintiff's counsel observed, that they did not then dispute the validity of the executory devise, but contended that the contingency never arose, Francis having arrived at 21. If the estate of the defendant was considered as a conditional limitation, it could not take effect until the event had happened. Courts will not remove land marks, adopted as rules of property, in pursuit of a doubtful intention of a testator. 8 Term Rep. 67. The 500*l.* legacy to the lessor of the plaintiff, depended on the dying of Francis or Peter under age and without issue. The using of the term survivor affords no argument of intention. A possibility coupled with an interest is devisable. 3 Term Rep. 88. And if Peter had died leaving children, and Francis had died under age, Peter's children would have taken. So if Peter had been elder than Francis, and had devised this possibility, and Francis had died under age, and without issue, the estate would have passed to such devisee. The true meaning of the expression survivor, is to denote to whom the estate shall go ; not one surviving and out living the other. It extends to the heir of either, as the event might be ; because otherwise, it might so happen that Elizabeth might lose her legacy of 500*l.* if one brother died before 21 leaving issue, and the other died afterwards without issue. In the limitation over of the realty, the word survivor is not used ; but the survivorship may as well be satisfied by our construction, of a death without issue under 21, as by the adverse one, of a death without issue under 30. If Francis arrived at the age of 30, it is admitted, that he might sell the lands devised to him ; what then would become of the survivorship ? The sum of 1650*l.* would be due to Peter in April 1805, when Francis would be 30 years of age ; and Peter might bring his actions to compel the annual payments, as they became due. The burthening of the lands devised to Francis, with the payment of a large sum of money, is auxiliary to the true construction of the will ; and is strong evidence to prove, that the testator intended him an estate in fee simple. Personality mixed with realty are the objects of the devise over to Peter, and he was to receive the money till it was fully paid by Francis ; ought not Francis then to have an absolute estate in the land ? Ought Peter to receive at least 1500*l.* out of the lands, before Francis reached his 30th year, spend the money, and then have the lands, to the great detriment of his brother's personal representatives ? Would

not the latter by such a construction, be without remedy? The age of 30 only respects the realty, in the codicil. It annihilates two of the contingencies contemplated by our adversaries, that of dying under 21 or without issue; of necessity they must drop them both. But substituting 30 for 21 will not give consistency to the will. Francis's having issue is not mentioned in the codicil. The limitation in the will applies both to Francis and Peter, but the codicil respects Francis only, and therefore the codicil does not respect the reciprocal contingency between the brothers contemplated by the testator.

Upon the whole of the will fairly considered, it is apprehended that the plaintiff is entitled to judgment, on the special verdict found.

The justices, having taken the special verdict into consideration, now proceeded to give their opinions *seriatim*.

Shippen, C. J., after stating fully the will and codicil, and the facts in the special verdict, observed as follows :

The question upon the special verdict is, whether Francis had at the time of his death, a vested estate in fee simple, so as that Elizabeth, the lessor of the plaintiff, his sister of the whole blood, on his dying intestate, shall inherit the land as his heir at law; or whether it shall go over to Peter, his brother of the half blood, by virtue of the clause in the will of the old Peter, devising it to him, in case of Francis's death under the age of 21, or without lawful issue, as an executory devise.

The solution of this question will depend partly on the general intention of the testator, manifested by the words of the will and codicil; taken all together; and partly, on the rules of law, as to the question whether the intention is such as that it can be legally carried into effect.

As to the question of intention, if judged of from the words alone, as used by a common man unacquainted with technical rules, there cannot arise much doubt but that he meant what the words plainly import; that if Francis should die within the age of 21 years, or if he should die at any time without lawful children, in either case Peter should take the estate in fee. To this, however, it is objected, that another intention appears; that if Francis should have children, he certainly meant they should succeed to the estate, and that for this purpose it is necessary that the word *and* should be construed *or*; otherwise, that if Francis should die under the age of 21, and should have married and left children, those children would lose their inheritance. To this it is answered, that the judges have never taken the liberty of

substituting a conjunctive for a disjunctive, unless to conform to the general apparent intention of the testator ; and that Francis, in the present case, being at the time of making the will above 20 years of age, the testator could not have contemplated his marrying, having children and dying before the age of 21, all within the space of one year ; and that therefore he must have meant, that either case happening, his son Peter should have the estate.

There appears by the codicil to be some variation of his intention. This codicil was made only two days after the will. In this he forbids his son Francis to sell the land till he arrives to the age of 30, when he might do with it what he pleased. It is contended by the counsel for the defendant, that the plain and obvious sense of this clause is, that the testator meant to substitute the age of 30 for the age of 21 mentioned in the will, and that it amounts to the same thing as if he had said—if my son Francis should die before 30 without issue, I then give the land over to Peter ; but if he should attain the age of 30, whether he has children or not, he shall have an absolute vested estate in fee simple, and may do with the land what he pleases. On any other construction, it indeed does seem difficult to account for his meaning in postponing his power to sell till the age of 30. If by the will there was a vested fee simple when he arrived to the age of 21, the prohibition to sell till 30 would have been absolutely nugatory.

The question of law arising upon the intention of the testator, it is material to consider. If the words, dying without lawful issue, should be construed to be after a general failure of issue; the devise over cannot take effect ; as a fee cannot be limited upon a fee, and the contingency would be too remote and tend to a perpetuity. But if it can be collected with reasonable certainty from the words of the will and codicil, that he meant a contingency, which must happen within the compass of a life or lives in esse, then the devise over will be good as an executory devise.

The restriction which the law imposes upon executory devises, is founded on the wise principle of preventing real estates from becoming unalienable for generations to come, whereby that property would become useless for the general purposes of a commercial society : but if this tendency to a perpetuity is avoided by the words or plain intention of the devise, the law indulges a testator in the power of bestowing his estate to a second devisee, upon a contingency which must happen, if at all, within a certain specified time allowed by law. Thus, a devise to A and his heirs, and if he die without heirs, to B and his heirs, is not permitted, on account of the remote-

ness of this contingency ; but if the clause had been to A and his heirs, and if he die within age, or if he die living B, then to B and his heirs, these are good executory devises, because the contingencies are confined to the period of a life in being. The leading case upon this point is that of *Pells v. Brown*, in Cro. Jac. 590. Many subsequent cases have been determined to be good executory devises on the principles of the case of *Pells v. Brown*, where the express words of living W. are not used, as in that case, but where it appears from a fair inference, drawn from any other words in the will, that the testator intended the devise over should take effect within the compass of a life or lives in esse. A strong case of this sort is that of *Porter v. Bradley*, cited at the bar from 3 Term Rep. 143, where the devise was to his son in fee, but in case he should happen to die, leaving no issue behind him, then over ; and this devise over was adjudged to be a good executory devise, the words leaving no issue behind him, being equivalent to the words, living William, in *Pells v. Brown*, and meaning leaving issue at the time of his death. This case of *Porter v. Bradley*, is commented upon in 2 Fearn 208, where it is suggested, that the determination must have gone on the words behind him, for that if it had stood upon the words leaving no issue, alone, it could not, consistently with former decisions, have been a good executory devise, as in the case of a real estate those words had been adjudged not to mean leaving no issue at the time of his death, but a general failure of issue. The distinction between a chattel interest and a freehold estate, is made in the case of *Forth v. Chapman*, 1 Wms. 667, where Lord Macclesfield says, the words leaving no issue, should have a different construction, as to a leasehold estate, from what it should have as to a freehold ; that in the former case, the words should be taken in their natural and vulgar sense, and to mean leaving issue at his death ; but as to a freehold estate, they should be taken in their legal or technical sense, namely, after a general failure of issue. Lord Hardwicke was of counsel in the case, and says in 3 Atk. 313, that Lord Macclesfield lay a good deal of weight upon the particular penning of that will, and said it would be a forced construction to have extended the words leaving no issue to a dying without issue generally. In the case of *Porter v. Bradley*, Lord Kenyon seems to have been struck with the impropriety of construing the same words in the same will differently, when applied to real and personal property ; and says, a great deal of argument would be necessary to convince him, that in the case of realty, those words should be taken to mean an indefinite failure of issue : and although the same judge, in a subsequent case of *Daintry v. Daintry*, in 6 Term Rep.

314, seems to recognize the case of *Forth v. Chapman*, yet it does not detract from the sound sense contained in his observations in the former case. And although he might think himself bound down by former decisions, yet it is not to be doubted if it had been *res integra*, but he would have persevered in the idea he had suggested in the case of *Porter v. Bradley*; especially as in a subsequent case in 7 Term Rep. 595, he remarks, that he was not prepared to unsay what he had said in *Porter v. Bradley*, and that small circumstances had been relied on to take particular cases out of the rule. By much stronger reason would he have entertained that sentiment, if he had to decide in such a case, in a country where the spirit of the feudal law has less force; and where the laws themselves, far from being calculated to support the pride of great families, by aggrandizing the heir at law, puts real and personal estates, as to descents and otherwise, nearly on the same footing.

In arguing the present case, the counsel on both sides have discovered great ingenuity. Numerous law cases have been cited and applied. That of *Walsh v. Patterson*, in 3 Atky. 193, cited on the part of the heir at law, has as far as it goes, nearly the same words, and was attended with the same events as the present case. After a devise to his son in fee, the testator directs, that in case his said son should happen to die before he should attain the age of 21 years, or without issue, he gives the estate to his wife and to her heirs and assigns forever; the son arrived to the age of 21, but died without issue; the Lord Chancellor decided, that it was a vested estate in the son, as he arrived to the age of 21, and though he died without issue, it should not go over to the mother. If the present will had gone no further, this case as well as another in the same book 390, taken with other similar ones, would have been decisive in favor of the plaintiff, as it would be dangerous to shake established rules of property; but where there are additional words and circumstances, that materially vary the cases, courts are not to be held by the trammels of technical reasoning, from deciding according to the fair meaning of those additional words and circumstances. 2 Fearne. 258. Indeed Lord Chief Justice Wilmot, in *Kelly v. Fowler*, says, that the court are bound to an artificial and technical sense of the words, unless there is an apparent intention in the testator, of using them in their natural meaning; and for that purpose, which is in favor of common sense, he goes so far as to say, the most trifling circumstance is sufficient. *Ib.* 245. And in 2 Vez. 121, it is said, the court always inclines to favor that construction which supports the limitation over, if it can be done, and has laid hold of

all opportunities of referring it to the want of issue at the time of the death.

The estate in question, was devised by the father to his son Francis, ether real and personal estate having been devised to his younger son Peter. The testator then directs, that in case of Francis's death under age or without issue, the whole estate devised to Francis, should go over to Peter, and in case of Peter's death under age or without issue, his estate should go over to Francis ; and adds, but in either case, the survivor of my said two sons, shall then pay unto my daughter Elizabeth or her heirs the sum of 500*l*. The word then plainly refers to the time when both Francis's and Peter's estates should be united in one of the two brothers, by the death of one under age or without issue. He had before given to his daughter Elizabeth 1000*l*., and he meant to give her this additional 500*l*. only in the event of one of the brothers taking both the estates, devised to them at first separately ; which event must necessarily take place if at all, on the death of him who shall first die. The words dying without issue, could not therefore mean dying without issue generally, but so as the survivor might take, 1 Wms. 534, which though a case of personal estate, yet the reasoning upon the word survivor, equally applies to real estates, being upon the intent.

The general governing intention of the testator, seems to have been, to give his real estate to his two sons, as the principal objects of his regard as to his land, and to give a money legacy to his daughter, and to increase that legacy if one of his sons should enjoy the whole land. If this be his clear, general intention, any subordinate intentions which may be suggested by ingenious counsel, must give way to it. One mentioned at the bar, struck me at the time with considerable force ; it was, that the testator having burthened the land devised to Francis, with the sum of 2300*l*. payable to Peter, could not have intended, that Peter should have the money, and the land also, or that Francis should have only a defeasible estate in the land. However, upon further reflection, I considered, that the testator had not only expressly given over the whole estate, which he had devised to Francis, in case of his dying without children, to be benefitted by it, but as the money to be paid to Peter was by instalments at future and distant days, he might have reasonably thought, that either the events which would entitle the survivor to the land might happen, or that the estate might be actually vested in Francis, before the money should be payable. This idea is naturally suggested by a case in Willes's Rep. 142, where the land was devised (after the death of A,) to B, she paying to her sisters 500*l*., and if B died, the land to go over to those sis-

ters. On a question whether this devise gave a fee simple to B, it was objected, that the words "if she died the farm to go over to the sisters," implied an intent to give to B, only an estate for life; but the court said, that those words might be intended to mean, "if she died before she paid the money." In the present case, the money had not been paid to Peter, nor by the terms of the will could it have been paid at the time of Francis's death. At any rate, an intent collected by conjecture, or a nice refinement, cannot prevail against an explicit intent, collected from the very words of the will.

The greatest difficulty in this case, arises from the objection, that in case Francis had had a child, and died before the age of 21, it could not be the meaning of the testator, that such child should be disinherited. The answer given to this at the bar, was, that Francis was so near that age when the will was made, that the testator could not presume such an event would take place. The event however, though improbable, was not impossible. If it had happened, and a contest had taken place between that child and Peter, the court would certainly have leaned strongly to the child. But it is not a new thing, to construe limitations according to the event, in order to support the intention of the testator. In the case of *Doe v. Fonnereau*, in Doug. 490, on a devise to his son A for life, and then to the heirs male of his body, and in default of such issue, to his second, third and fourth sons successively, in tail male; Lord Mansfield determined, that the estate should go over to the second son, in one of two events: if A had issue male, then the second son should have a remainder expectant, barrable by a common recovery; but if A had no issue male, (which really happened,) then the second son should take by way of executory devise. Lord Mansfield supported his decision by two or three authorities; one was the case of *Hopkins v. Hopkins*, where Lord Talbot decided, in support of the intent, that a limitation which in one event would have operated as a remainder, but which event did not happen, should operate as an executory devise; and Lord Mansfield said, a great estate was then held under that determination;—another authority was the case of *Brownsword v. Edwards*, in 2 Vez. 249, where a devise was held to operate either way, according to the event.

The truth is, that cases on wills are so various, that the best law judges have told us, that although adjudged cases must be followed, otherwise the law would be uncertain, yet cases in point on wills, must be *in verbis ipissimis*, and made by testators in the same situation and circumstances, otherwise the in-

tention is to govern, as it appears from each will. Barr. on Stat. 370. 2 Wils. 324. 3 Wils. 247.

Taking the whole case into consideration, with all its circumstances, I am of opinion, that the defendant took the estate in question, by a good executory devise.

Yeates, J. This case has been argued by the counsel on both sides, with much zeal and ingenuity. Almost every authority in the books, which bear, upon the subject, has been marshalled in full array, by the contending parties.

Since the case of Robinson v. Robinson, 1 Burr. 38, which was agitated for near half a century, it is clearly established, that in the construction of a will, we must first look to the general intent of the devisor, and give effect to that ; and if there be a secondary intent, which interferes with it, we are to reconcile the whole, as far as we can ; but in all events, to give effect to the general intention. 8 Term Rep. 9. The general intent is first to be found out, and then as much as language and grammar will permit, particular expressions are to be interpreted accordingly. Lofft. 270. To give effect to the devisor's general intent, the court will overlook a particular intent, inconsistent therewith. 3 Term Rep. 490. 4 T. R. 87. 5 T. R. 303, 305. 6 Term Rep. 533. 2 Fonbla. 58, 59.

[He then stated the will and codicil particularly.]

The testator died shortly after making his will and codicil. From the statement in the special verdict it appears, that Francis Shitz was 20 years and 10 days old, when the codicil was executed and died of the age of 22 years, 8 months and 27 days, without lawful issue. If he died intestate seized of a vested estate in fee simple, the lessor of the plaintiff would be entitled thereto, as sister of the whole blood, and heir at law of Francis.

Judging from the common import of the words of the will itself, there can be no doubt, but the testator intended that Peter should succeed Francis in the enjoyment of the lands, on the event happening on which the limitation over was to take place. Whether this was one or two contingencies, on a fair legitimate construction of the will and codicil, becomes the object of inquiry. Upon the grammatical construction, there cannot be the smallest difficulty. The words are " but in case my said son Francis shall die under the lawful age of 21 years or without lawful issue, then and in that case, I give, &c." A grammarian could not hesitate to say, that on either event, it was the meaning of the father that Peter should take the lands devised in the first instance to Francis. But this interpretation has been strongly resisted by the plaintiff's counsel.

They have not, it is true, gone as far as Mr. Hargrave in his observations on the rule in Shelley's case ; and asserted, that their rule of construction possessed "a quality rigid, stubborn, imperious, irresistible, and so indispensable, as to be above all exception whatever, and proudly disdained all compromise of differences, and all participation of power." Hargr. Law Tracts, 562, 574. 4to ed. But they have contended, that an uniform series of judicial decisions has accurately defined the technical sense of the words made use of by the testator, and that the specific words have gained a fixed legal import by construction, which have since become the sacred, inviolable land marks of property, binding on all judges. 1 Burr. 233. 7 Term Rep. 658. 8 T. R. 67. That counsel have actually refused to argue such a case. 7 Term Rep. 668. And that we are bound by the authority of those decisions, as firmly as the Pagan dieties were supposed to be by the decrees of fate. Jones on Bailments. 46. They have insisted that no instance can be shown, where on an antecedent estate in lands given by a will, with a limitation over in case of the first devisee dying under age or without issue, that the estate went over, in case the devisee arrived at full age, though he died without issue. They have relied on this, that the expressions in the will before the court form but one contingency.

If such be our official duties, it certainly becomes us to submit to them with due deference ; but it is fitting that in such a case we should make a solemn pause, and consider well the adjudications and their grounds, before we form our opinions.

I shall now therefore take the liberty of reviewing the authorities cited by the plaintiff's counsel, and some others of the same kind, which have occurred to me, in my researches on this subject, though I fear, the enumeration will be tedious.

In Chapman v. Dalton, Plowd. 289, several cases are put, where words in the copulative shall be taken in the disjunctive, if such sense be most strong against those that speak them ; and *vice versa*. They shall be taken in such way, as will make the words stand with reason, and the intent of the parties.

In Wollon v. Cook, 1 Anders. 55, the word *divers* in an agreement is said to be a word indifferent ; and shall be construed according to the sense, in which it is used in the subject matter.

In Baldwin v. Cocks, 1 Leon. 74, a lease was made to Truepenny and one Elizabeth Rede for 21 years, if the said T. and E. or any child or children betwixt them begotten should live so long ; E. died within the term without issue ; and adjudged, that by the death of E. the lease was not determined. For the

disjunctive before (child) makes all the limitations in the disjunctive.

In *Soullé v. Gerard*, Cro. El. S. C. Moor. 422. Noy. 64. 525. devise to one of four sons and his heirs forever, and if he die within age or without issue, to his three other sons jointly. The devisee had issue a daughter, and died within age, and it was adjudged that he took an estate tail. This case is said by Lord Chief Justice Willes to be of little authority. Willes' Rep. 311, (though it seems to be recognized in 1 L. Raym. 506. *Sed vide* S. C. 12 Mod. 277. Oomy. 95, and 3 Term Rep. 474.) and to be stated but obscurely; but that the intent of the testator was clear and manifest, which guided the construction.

In *Paine v. Mallory*, Cro. El. 832, a lease was made by an abbot, rendering rent during the term to him or his successors; and held to be a good reservation to him and his successors, by reason of the express intention and reservation.

In *Daniel v. Waddington*, Cro. Jac. 377, one joint-tenant made a lease for years, if he and his companion live so long. The court held the lease to be determined by the death of either of them; for it is, if they two live so long. It was refused to change *and* into *or*.

The case of *Hanbury v. Cockerel*, cited in 2 Fearn 18 from 1 Rol. Ab. 384, (though I do not find it there, but observe it cited Hardr. 150) has been referred to by the plaintiff's counsel. There the contingent remainder could not take effect, as the contingency of the son dying under 21 and without issue had never happened. All the preliminaries must happen before the remainder can take effect. Hard. 150. The same principle is laid down in *Doo v. Brabant*, 3 Bro. Ch. Rep. 390, *Scott v. Chamberlayne*, 3 Ves. jr. 302, and in many other books.

In *Sayer v. Glean*, 1 Lev. 55, in debt on a bottomry bond, where the money was payable on several contingencies in the disjunctive; it was resolved that the money became due on the first contingency happening, and that the law would supply the want of those words in the instrument.

Collinson v. Wright, 1 Sid. 148, was cited at the bar. On this case Powell in his treatise on devises 252, accurately points out the distinction between the words "and if he die without issue," (used with reference to the first devisee) standing alone, and the words "and if he die without issue living A." or the like, or "before A. arrive at 21 years of age," &c. so used. For the former words operate only as an explanation of the testator's intent, who shall succeed, namely issue of his body; and whensoever the devisee dies without issue, the land will remain over. But the latter words qualify the preceding estates with a collateral determination, give

effect to a conditional limitation to another, if such an event happen, and operate as a complete defeazance of the first fee upon that event; but by no means tend, independent of such event, to abridge or narrow the extent of the estate first limited, or to reduce it from a fee simple to an estate tail. 1 Sid. 445. Dy. 354. Cro. Jac. 590. This distinction is also applicable to Claches' case, also cited by the plaintiff's counsel from Dy. 330, b. 331, *a*.

In *Hall v. Philips*, 1 Vent. 62, on the construction of the excise act of 15 Car. 2, c. 11, the word *or* was construed *and*, on the ground of general apparent inconvenience, that would follow from the clause being construed in the disjunctive; for otherwise, this act, which was made to be further remedial to the king, would rather disappoint the revenue of excise, given by former statutes, which required an entry to be made.

Price v. Hunt, Pollex. 645, was read by the plaintiff. In that case, the argument of Pollexfen for the defendant went on three grounds. 1st. That whether the word *or* was taken in the disjunctive or conjunctive sense, the plaintiff had no title. 2d. That the plaintiff's construction would defeat the intention of the testator, and disinherit the issue of the son, if he had died before 21. And lastly, that the meaning of the testator was plainly expressed, that his son should have the lands to him and his heirs and assigns forever, and freely to give, settle or dispose of the same, at his pleasure. Pollex. 648, 650. On which of these grounds the court went does not appear.

In *Hilliard v. Jennings*, (said in 1 Bl. Rep. 101 to be best reported in Carth. 514,) S. C. 12 Mod. 276, 1 Ld. Raym. 505, 1 Freem. 509, Comy. 90, 94, there was a devise much resembling the case before us. The testator devised to his son Thomas and his heirs forever, his manor of E.; but if it should happen that his said son should die before he attained the age of 21 years, or without issue of his body, then his lands should be divided between his daughters Mary and Elizabeth, and their heirs forever. Thomas, the son, entered and became seized, *prout*, &c. and having arrived at full age, devised to the plaintiff:—and it was held, that Thomas, the devisee, took only an estate tail. In 1 Freem. 510, it is stated, that the court inclined against the plaintiff, that the son had but an estate tail, and so the devise to the daughters took effect, the son having died without issue. For though it is devised to him and his heirs, yet the latter words, if he die without issue, make it an estate tail; because his meaning seems to be plain, that if his son had issue, the issue should have it, if not, it should go to the daughters. According to the report in 1 Ld. Raym. 506, Lord Chief Jus-

tice Holt said, there is no necessity to construe *or* as *and*. The case of *Soulle v. Gerard* was adjudged to be an estate tail; and it may be it was the father's design to restrain the marriage of his son before the age of 21 years. In 12 Mod. 277, the same sentiments are ascribed to Lord Holt, and that he afterwards denied the case of *Soulle v. Gerard* to be law. It appears by that book that judgment was given for the defendant.

We may confidently pronounce, that this case forms a striking exception to the inviolate uniformity of the rule of construction contended for by the plaintiff's counsel, and that their observation on this head was not made with their usual accuracy.

In *Woodward v. Glassbrook*, 2 Vern. 388, the testator devised houses to his several children in tail, but if one of them should die before 21 and unmarried, such child's part to go over to the surviving children; the Lord Chancellor would not suffer *and* to be read *or*. If any of the children died unmarried, though above the age of 21, his share shall go to the survivors.

In *Regina v. Baines*, 2 Ld. Raym. 1201, it was said by Broderick, *arguendo* that joint words in a pardon may be construed severally, according to the subject matter.

In *Richardson v. Spraag*, 1 Wms. 434, a mother devised money in trust for such of her daughters, or daughters' children, as should be living at her son's death. Some of the daughters were living at the son's death, and had also children, and others were dead leaving children. The Master of the Rolls held, that the word *or* should be taken for *and*, because otherwise the whole devise would be void for uncertainty; the word *or* might possibly have been of use, in regard all the daughters might have died in the lifetime of the son.

In *Right v. Hammond*, 1 Stra. 427, the plaintiff's counsel contended, that the word *or* in a devise should be construed *and*. The court gave no opinion on that point, but held that the devise to the defendant was not good, either as a contingent remainder or executory devise. Besides, the contingency had never happened, on which the defendant's title rested. The cases of *Read v. Snell* 2 Atky. 643. *Walsh v. Patterson*, 3 Atky. 193, *Barker v. Suretees*, 2 Stra. 1175, and *Framlingham v. Brand*, 3 Atky. 390, have been severally cited by the plaintiff's counsel, and much relied on. It will be found in each of them, that they were determined, in order to effectuate the intention of the several testators. 3 Term Rep. 473, per Ld. Kenyon.

In *Haws v. Haws*, 1 Vez. 13, 3 Atky. 524, 1 Wils. 165, *and* in a will was construed as *or*, to correspond with the clear intention of the testator.

In *Jackson v. Jackson*, 1 Vez. 217, testator devised leasehold

after the death of his wife, to his son R., for so many years, &c. if then living; but if then living and should then or hereafter have issue male, to him absolutely, otherwise over. R. dies in the life of the wife, leaving a son: it belongs to the son as representative of R; *and* shall be construed *or*, to make the words answer the intent.

In *Brownsword v. Edwards*, 2 Vez. 243, the testator devised to trustees in fee, until John Brownsword should attain the age of 21, and if he should attain 21, or have issue, then to the said John and the heirs of his body; but if the said John should die before 21 and without issue, then over to Sarah Brownsword, exactly in the same words as in the former devise. John, the first devisee, attained 21 and died without issue. An estate tail vested in John at 21, or on having issue; and Lord Hardwicke laid it down, that in cases of wills, the governing rule of construction is the intention of the testator which the court is to find out by his words, and to construe conformable thereto, so far as it is possible, consistent with the rules of law. There was no necessity in this case, to range words in a different order, or to transpose them, to comply with the intention, or to supply material words.

In *Wright v. Kemp*, 3 Term Rep. 470, occurred the case of a surrender. In pa. 473, Lord Chief Justice Kenyon thus expresses himself: where sense requires it, there are many cases to show, that we may construe the word *or* into *and*, and *and* into *or*, (2 Stra. 1175 and 3 Atky. 390,) in order to effectuate the intent of the parties. Here therefore, in order to give effect to the intention of the surrenderor, we must say, that when he used the word *or*, he meant *and*.

In *Beachcroft et al. v. Broome*, 4 Term Rep. 441, under a devise to A and his heirs, but if he die without settling or disposing of the same, or, without issue then over. A did settle and dispose of the estate given to him, and died without issue. The court said, there was no doubt but the devisor intended that he should have the power so to do. It was impossible to raise any serious doubt in the case.

This was the case, which the counsel for the defendant declined to argue.

In *Doo v. Brabant*, 8 Bro. Cha. Rep. 393, S. C. 4 Term Rep. 706, there was a devise to trustees, in trust for A till 21, then to transfer to A, but in case A should die under 21, leaving children, then to the children; and in case A should die under 21, without children, then to the nieces of the testatrix. A attained 21, but died in the life of the testatrix, leaving issue born before she attained 21. It was held at law, that the events pointed

out not having taken place, the children took nothing under the will.

In *Doe v. Burnsall*, 6 Term Rep. 30, the testator devised all his estates to A, and the issue of her body, as tenants in common; but in default of such issue, or being such, if they should all die under 21 and without having issue, then over; Lord Chief Justice Kenyon lays down the law on the subject accurately, as follows: There is no doubt, but that a word of conjunction in a will has been construed in the disjunctive, and *vice versa* a disjunctive construed into a conjunctive, where it has been necessary to give effect to the devisor's intention; but unless there be something in the will, from which it is to be collected, that the devisor did not use such words in the grammatical sense, the grammatical sense must prevail. In the present case, the word used is a conjunctive word *and*; now by construing that word in its proper sense, we shall give effect to the intention.

In a late case in 1797, *Maberly v. Strode*, 3 Ves. jr. 450, there was a limitation over in a will, upon the death of a person unmarried and without issue; by which it would seem at first sight, that there should be a concurrence of two events, before the gift over was intended to take place. The devisee did marry, but died without issue. The master of the rolls held, that "unmarried," in its usual sense, meaning "having never been married," and unless *and* was read *or*, the latter words "as to his dying without issue," had no meaning, (that being the necessary consequence of dying unmarried,) the bequest over had taken place on the single event of the devisee dying without issue, in order to give a fair and reasonable construction to the will. Hence it appears, in addition to the general principle laid down in the case preceding, that the substitution of words is regulated solely by the manifest intention of the testator.

I have thus taken a cursory review of the cases on this subject. I sensibly feel, that I have consumed time unnecessarily, and might have availed myself of Lord Kenyon's rule in *Doe v. Burnsall*. But I had prescribed that task to myself.

The result I think, we may venture to assert to be, that the court will transpose, insert and reject the most operative words, to give effect to the general intention of a testator, 2 Fearne 271, 272, 4 Vez. jr. 311, 329;—will deviate from the meaning of technical words in a will, for the same purpose, if the rules of law are not thereby violated, Bos. and Pull. 256, 3 Burr. 1634;—but will never take the unwarrantable liberty of contravening or disappointing a will, unless it be contrary to law; and the principle, that wills must be consistent with the rules of law, is not to be applied to the construction of words, but to the nature of the estates themselves. To

argue, that the intention shall be frustrated by a rule of construction of certain words, is to say, that the intention shall be defeated by the use of the very words which the testator has adopted as the best to communicate his intention, and of which the sense is intelligible to all mankind. 2 Bla. Com. 385. Christian's note (13.) The testator is presumed to be *inops consilii*, and therefore though he uses inapt and barbarous words, the law will so frame and mould them, as to make proper sense to serve the intent. 1 Vez. 146. 2 Atky. 130. 1 Collect Jurid. 389.

If the intention of a testator be clearly and manifestly contrary to the legal import of the words, which he has hastily and unadvisedly made use of, (Per Blackstone, J. in *Perrin v. Blake*, Hargr. Law Tracts, 495, 4to. edit.) the technical rule of law shall give way to this plain intention of the testator. 2 Wms. 673. 4 Burr. 2246. 4 Bro. Cha. Rep. 460. This has been the law for four centuries at least, if not longer. It is said by the judges in 9 Hen. 6 pa. 24, that a devise is marvellous in its operations, and many instances are given, where it may countervail with the ordinary rules of law. The like doctrine is to be met with in every reporter since. But then this intention of the testator, which is to ride over and control the legal operation of his own words, must be manifest and certain, and not obscure or doubtful. 6 Co. 16. The intent must not be conjectural, but by declaration plain. Hob. 33. There must be plain expression or necessary implication of his intent. 2 Vez. 656.

It is difficult to ascertain, that the testator in the will before the court, meant to restrain his son Francis from marrying in his minority, as was said in Lord Vaux's case, Cro. El. 269, and by Lord Holt in *Hilliard v. Jennings*. 1 Ld. Raym. 50 506. 12 Mod. 277. But it is certain, that the conjecture was not founded on a probable calculation of chances, if the testator contemplated a concurrence of events; of his own death, of his son's marriage, and of his having issue within a less period than one year after the making of his will. I freely admit, that according to the defendant's construction, every clause in the will is not rendered consistent; particularly, in the instance of the large payments which should have been made to Peter, before his brother attained 30 years of age; and yet that Peter might afterwards take the lands to the great detriment of his brother's personal representatives; and that as it cannot be denied, but that Francis might have sold the lands after he was 30 years old, the survivorship therein, would be defeated thereby. In the premature death of Francis, no money was payable to Peter. The testator was illiterate. He could not even write his name, but made his mark to his will and codicil. His

want of comprehension of mind was not probably greatly aided by his scrivener; and they did not together, in all likelihood, view or calculate on the several events which might happen in the intended disposition of his estate. But he could not have forgot his great primary object, to whom his lands should go after his death. He has, in my idea, fully provided on that head, in direct terms, which remove all doubts from my mind. I concur in the authority of book-cases on the construction of wills; but where they do not precisely correspond in every particular with the case under consideration, I feel myself at perfect liberty to collect the intention of the testator from his own written words, which will outweigh with me all arguments drawn from an obscure and doubtful intention.

Whether the direction of the testator was impotent or not, he certainly intended by his codicil, that Francis should not sell the lands devised to him till he was 30 years old. In case Francis died under the age of 21 years, or without issue, he expressly gave his share in his whole estate to Peter his son in fee. In the event of either of his sons dying under age or without issue, the survivor taking the whole estate shall then pay unto Elizabeth 500*l*. But if Peter, as events have occurred, should not succeed to Francis, the 500*l*. could not be raised for Elizabeth, as the two estates would continue divided, and her husband, if he had lived and survived her, would by this construction have held the premises during his life, notwithstanding the jealousy expressed of him in the will. Moreover, the mutuality of survivorship between the brothers on the occurrence of the events pointed out, is a strong additional argument in support of the construction contended for by the defendant.

The general rule certainly is, that devises shall stand as at the time of making the will, and shall not be construed by any after act, or collateral contingency, Talb. Cas. 26, or subsequent circumstances. 1 Vez. jr. 475. But as has been already observed, there have been cases where it has been held in support of the intent, that a limitation over, which in one event would have operated as a remainder, but which event did not happen, should operate as an executory devise. Talb. Cas. 50. 2 Vez. 249. Doug. 490, 491. 2 Fearne 494 to 498.

Combining the will and codicil together, as one instrument, I have no hesitation in saying, that the testator has manifestly and certainly expressed his meaning, that on Francis dying without issue under the age of 30 years, he intended that Peter, if he survived him, should hold the premises in fee.

The next question which presents itself is, whether this intention be compatible and consistent with, or repugnant and contrary to

the rules of law. For it is clear, that a man cannot create a perpetuity by will ; he cannot put the freehold in abeyance ; he cannot limit a fee upon a fee, nor make a chattel descendible to heirs ; nor prevent a tenant in tail from suffering a recovery. Per Buller Just. Doug. 327.

It would be a waste of time to cite authorities to prove at this day, that if an estate be given to A in fee, and by way of executory devise an estate be given over, which may take place within a life or lives in being, and 21 years, and the fraction of a year afterwards, the latter is good by way of an executory devise. 7 Term Rep. 558, 595. We need not call in the aid of eminent law characters to show, that in cases of this nature, there is no magic or particular force in certain words more than others. Per Ld. Hardwicke, 1 Vez. 142. 2 Atky. 246, 570, 577. Per Buller Just. Doug. 327. Per Lord Chief Justice Kenyon, 3 Term Rep. 473. Their operation must arise from the sense they convey.

I throw no stress on the cases which have been cited by the defendant's counsel, of limitations over of personalties. They are fully commented on in 2 Fearne 167, &c, 2 Fonbla. 326, &c. I take the correct rule to be, that where there is a limitation over of real estate, on a dying without issue generally, without other words expressly restrictive of their operation, that such expressions ought to be construed an indefinite failure of issue, and the limitation over as too remote. This I think has been abundantly shown by the plaintiff's counsel, and that there exists a clear distinction in the construction of limitations over of real ties and personalties in England. 2 Fearne 194. 3 Atky 289, 396, 397, 398. 3 Wms. 261. 2 Vez. 180, 616, 683, 325. 6 Term Rep. 312, 313, 314. Cowp 411. 3 Term Rep. 494.

But I think expressions have been made use of by the testator here, which confine the contingencies to the compass of time allowed by law, and are the same in effect with Pells v. Brown, Cro. Jac. 590, though not in *terminis* ; and that there is not the smallest danger of a perpetuity in the present instance. Prec. Cha. 68, 69. Because,

1st The words assigns forever, are attached to the first devise, which formed one of the grounds of decision in Porter v. Bradley, in 3 Term Rep. 143. 2 Fearne 209.

2d. The words, then and in that case, may fairly refer to the time of the events happening, when Peter shall become entitled according to what is said by Ld. Kenyon in 7 Term Rep. 557.

3d. The surviving brother was in either case to take the property devised to the other.

And 4th, which is the strongest ground, the payment of the 500l. to Elizabeth, the sister, is fixed as a cotemporary act to be performed by the survivor, who was then to pay her the money, when he took the land. At any rate, it could not exceed the year 1810, when all the payments would be completed. This excludes the idea of an indefinite failure of issue.

There is nothing in the will to show that the testator intended that the limitation over should not take effect till future generations; but on the contrary, there is sufficient to show the intention, that the estate should go over immediately on the death of Francis without issue, and should vest in Peter surviving at the time of the death of Francis, under the age of 30 years.

The plaintiff's counsel relinquished this point on the last argument. If it needed further support, it has been urged, that the inconvenience of perpetuities is the reason for confining executory limitations and future uses to their proper bounds. But the effect of any limitation or proviso, in respect to creating a perpetuity, ceases where such limitation or proviso is made subject to the power of the person on whose estate it is to operate; and the moment it becomes capable of being barred or destroyed by him, it can no longer be said to tend to a perpetuity any more than an estate tail with a remainder over does; which estate and the remainder over, are capable of being barred by the tenant in tail. 2 Fearne 81, 107, 108. In proof of these positions, several cases have been cited by the defendant's counsel.

I will only add, that courts will always incline to favour such a construction as will support the limitation over, if it can be done, and will lay hold of any opportunity of referring dying without issue to a want of issue at the time of the death, even in the case of a deed. 2 Fearne 272. The case of *Exel v. Wallace*, 2 Vez. 118, furnishes a strong instance in support of this principle.

Upon the whole, I am of opinion, that the devise to the defendant, under the circumstances stated in the special verdict, is good by way of executory devise, and that he is entitled to judgment.

Smith, J. As the Chief Justice has arranged the facts resulting from the special verdict, and the will, which is part of it, fully and accurately, I deem it unnecessary and improper, to take up time in giving my statement. With the will, the special verdict and the statement, which have been read by the Chief Justice, as much in my view as if I had read each of them, I proceed to consider the merits.

But before I enter into the discussion, I think it proper to banish

from my mind, one circumstance, which certainly ought not to have been brought into view, nor even glanced at. The merit or demerit of the parties cannot weigh a grain in either scale, in deciding a question of law, on special verdict.

The cause has been exceedingly well argued on both sides. A very great number of cases indeed have been cited. The counsel have displayed industry and attention, in collecting perhaps most of the cases material in the discussion. They have also shown a discriminating judgment, in the selection and arrangement of the cases produced, and perhaps we are obliged to them for not enlarging the number, as the cases in the books in this branch of the law would probably fill a volume, and require as much paper, as would sometimes cover the land in dispute. If they have not been able to produce a case in point, it is, I take for granted, because no such case exists. Indeed, cases upon wills may guide as to general rules of construction. But unless a case cited be in every respect in point, and agree in every circumstance, with that in question, it will have little or no weight with the court. 3 Wils. 142. S. C. 2 Wils. 324. Per. Wilmot, C. J. For it is difficult to find two cases, that agree with each other, in every respect. Per Willes C. J. Willes 312. Bos. and Pull. 256. Particular cases serve rather to obscure and confound than to illustrate questions of this kind. Per Wilmot, J. Burr. 1541. One judge of no mean talents, goes so far as to say—indeed I have long been tired of looking into cases upon wills. Per Rooke, J. Bos. and Pull. 263.

No certain rule is to be laid down in the construction of wills, but they must depend upon their particular circumstances. Per Lord Hardwicke, 2 Atky. 374. 2 Bla. 382. Decisions upon other words something like those in question, in other wills where the whole context of those other wills must be gone into can afford very little assistance. Per Eyre. Bos. and Pull. 258.

In one sense, I have been tired by looking at the book cases, on the present occasion; but by an attentive examination of the numerous cases cited, and of some which were not cited, I have been enabled to form an opinion satisfactory to my own mind, founded I believe, on solid principles of law, and giving effect to the general intention of the testator.

As to book cases on wills, my own opinion is, that unless they are in the very point in every particular, they are not authorities to compel us to defeat the intention of a testator; but that analogous cases are often useful in furnishing us with arguments in answer to the reasonings and ingenious glosses, made use of to defeat such intention. Cases in point always, and analogous,

cases frequently, enable us to give effect to the intention of a testator, when it is not inconsistent with the clearly established rules of law.

I proceed to state and apply such general rules of law, as are applicable to the case before us, which must guide, direct and govern us in the decisions of it; premising, that within a century past, a more liberal construction of the words of a testator has prevailed, and they have been generally taken in their popular sense, which is most likely to have been his meaning. Per De Grey, 2 Bla. Rep. 1012.

1. The general principle is, that the heir takes all, which is not given for a defined and specified purpose by the will. 2 Ves. jr. 271. There is no other way to exclude the heir, than by giving the estate in question to some body else. 2 Ves. jr. 225. Cowp. 661.

2. I lay it down as a clear position, that the heir shall never be disinherited by implication, 1 L. Ray. 185, *arguendo*. Vaugh. 262. If such implication be only constructive and possible. Cowp. 92. Not by conjecture, ambiguity or uncertainty. It is laid down in many books, that he is not to be disinherited, unless by express words, or a necessary implication. Vaugh, 262-3. 3 Atky. 10 Prec. Cha. 384, 440, 471. Burr. 1686. Ray. 453. Willes 650. 3 Wils. 418. 7 Bro. P. C. 350. Willes, C. J. says, the rule is not as laid down in Vaugh. 262-3, that an heir shall not be disinherited except by express words, or such as have a necessary implication. But the rule is, that the intent of the testator ought to appear plainly by the will itself; otherwise, the heir shall not be disinherited. He cites several adjudications to prove, that this is the rule. Willes 140, 309, 297. Burr. 1541, 1686, per L. Mansfield.

3. It is not seventy years, since Sir J. Jekyll, master of the rolls, declared, there is a diversity of opinions among the learned judges of the present time, whether the legal operation of words in a will, or the intent of the testator, shall govern. For my part, I shall always contend for the intention, where it is plain; and I think, the strongest authorities are on that side. For if the intention is sometimes to govern, as it is admitted it must, and not always give way to the legal construction, and yet at other times shall not govern, there will then be no rule to judge by, nor will any lawyer know how to advise his client; a mischief which judges ought to prevent. 2 Wms. 741.

I believe no such diversity of opinion now exists among judges, or lawyers. For the intention of the testator is now looked upon as the polar star, directing them in the construction of wills, provided it be not inconsistent with the rules of law. Burr. 1112-3

Wils. 142. Willes 296-7. There is no rule better established, than that the intention of a testator, expressed in his will, if consistent with the rules of law, shall prevail. Doug. 327. Burr. 1112. Amb. 377. 3. Atky. 234. 1 Fonb. 142-3. 1 Bla. 377.

The intention of a testator is to be collected from the whole of his will, *ex visceribus testamenti*, so as to leave the mind quite satisfied, about what the testator meant. This is the principle. Per Wilmot. Burr. 1541, 1686, 770, 922. 3 Atky. 526. 1 Vez. 169. Black. 738. 1 Wms. 741. 1 Atky. 416. Willes 3.

There can be no technical words in wills, but they are to be construed according to the intention of the parties. Per Henley, L. Keeper. 4 Term Rep. 297 in note. 1 Atky. 468, 470. Bos. and Pull. 256. Willes 350-1 Burr. 770. No precise form of word is necessary. Black. 377. Burr. 272, 770. I will depart from the technical sense of words to effectuate the intention of the testator, as far as I can, without violating the rules of law. Per Eyre. Bos. and Pull. 257. If a testator make use of legal phrases, or technical words only, the court are bound to understand them in a legal sense; but if he use other words, which manifestly indicate what his intention was, and show to a demonstration that he did not mean what the technical words import, that intention must prevail. Per Buller. Doug. 327.

To attain the intent, words of limitation shall operate as words of purchase; implication shall supply verbal omissions; the letter shall give way; every inaccuracy of grammar, every impropriety of terms shall be corrected by the general meaning if that be clear and manifest. Per Lord Mansfield, Burr. 1634-5.

No words of my own can convey my opinion on this point more forcibly than those of Lord Chief Justice Willes. "I will in the first place find out what was the intent and meaning of the testator; because if the intent be clear and not inconsistent with the rules of law I will always endeavor, if I possibly can, that the intention of the testator may take effect, and will never take pains to find out little niceties in the law to defeat the intent of the testator." Willes 350.

4. It may now be considered as an established rule of construction, that if the court can see a general intention, consistent with the rules of law, but that the testator has attempted to carry it into effect in a way not permitted, the court is to give effect to the general intention, though the particular mode shall fail. By the Master of the Rolls, 4 Ves. jr. 329. Instances of this are found in 1 Burr. 51. 3 Atky. 736. 1 Wms. 333.

By Robinson v. Robinson, 1 Burr. 38 to 51, which was sifted

and considered more than any preceding case, this position is clearly established, that in the construction of a will we must first look to the general intent of the devisor, and give effect to that; and if there be a secondary intent which interferes with it, we are to reconcile the whole, as far as we can; but at all events, to give effect to the general intent. In that case the special intent was defeated, and to attain the general intent, the construction was contrary to the express words. Per *Ld. Kenyon*, 8 Term Rep. 9. 4 Term Rep. 87. 1 Burr. 51. 3 Atky. 736. 2 Vez. 232. 5 Bro. P. C. 286. 2 Wils. 323. Willes 350, notes. 5 Term Rep. 303, 7 Term Rep. 533.

5. Executory devises were utterly unknown to the common law. *Palmerston's case*, 38 Eliz., was the first of them. 1 Stra. 130. They have obtained, with much ado, and for some time after they prevailed, were looked upon with a jealous eye, lest they should run into a perpetuity. They were confined to a life in being; and so late as 11 Will. 3, *Treby*, C. J., declared, that further they should not go, with his consent; 12 Mod. 287, Stra. 958. By the judges of B. R. at first. 2 Wils. 64. 2 Equ. Abr. 349. Just before this, viz. 1697, the house of lords extended them to one year after a life in being. Prec. Cha. 73. Show. P. C. 137. 18 Vin. 405. Stra 130. 10 Mod. 422. On the authority of 2 Mod. 289, it was adjudged in 1736, though with reluctance, that a devise to such unborn son of A as should attain the age of 21, (i. e. 21 years after a life in being) was a good executory devise. Talb. Cas. 232. 2 Black. 174. Lord Mansfield says, the court in this case took a large stride of 21 years, after a life in being. Doug. 490. The time is now extended to a life in being, and 21 years and some months, allowing for the time of gestation. 7 Term Rep. 102, 558. Willes 213. 7 Term Rep. 103, note.

Of late years, the doctrine of executory devises has been settled. It is extremely well settled by *Ld. Kenyon* in 7 Term Rep. 558. They have not been considered as bare possibilities, but as certain interests and estates, and resemble contingent remainders in all other respects, only they have been put under some restraints, (viz. confined as aforesaid,) to prevent perpetuities. Willes 213. 7 Term Rep. 103, note. 7 Mod. 302. 8 Vin 112. Talb. Cas. 117. They are devisable. 1 H. Bla. 32. 3 Term Rep. 88. 1 Fearne 544. The court always inclines to favor that construction which supports the limitation over, if it can be done, and has laid hold of all opportunities of referring it to a want of issue at the time of the death. 3 Wms. 260. Talb. Cas. 56. These are cases of chattel interests.

6. It is contended, this rule of construction is confined to chattel

interests, and does not extend to estates of freehold; that a different construction must be put upon the very same words in a will, as applied to real or personal estate; that a devise to A and his heirs, and if he die without issue, or leaving no issue then to B, if the devise be of a chattel interest, these words will be construed in the vulgar and natural sense; and if A die without leaving issue at the time of his death, the devise over is good. But if there be a freehold also devised by the same words in the same will, the same words must be construed in their technical, legal, and (must I add unnatural) sense, and extend to an indefinite failure of issue and there the devise over be void!

If such be the settled rule of law, if such construction has become a rule of property, however absurd I may deem the distinction, although I may be convinced that it defeats the intention in the disposal of their real estates of 99 out of 100 testators, who make their wills without the assistance of able counsel, yet I certainly shall not be the first to shake it or any other settled rule of property. If this or any other rule of property has crept in, or shall creep in, through inadvertancy or otherwise, which by experience shall be found to be contrary to reason, defeating the intention of testators, or inconsistent with the general interest; if any of the rules, of property established in that country from which we derive the foundation and general outline of our laws, which rules, though very proper for the state of society and constitution of that country, may be found improper for the state of society among us, or inconsistent with the spirit of our constitution and government, the legislature can, and no doubt will, on proper representations, make from time to time such alterations as may be necessary to regulate property in a manner most conducive to the general interest of the community. We must declare the law, when clear, without regarding consequences.

This distinction is stated in *Forth v. Chapman*, 1 Wms. 663, which is relied on in several subsequent cases. 3 Wms. 261. 3 Atky. 288. 2 Atky. 647. Talb. Cas. 250, 1 note. 2 Vez. 180, 616. Willes 313, Cowp. 411. 6 Term Rep. 314, to answer best the intention of testator. 1 Burr. 272, to support his intent.

Lord Chief Justice Kenyon says, the distinction in *Forth v. Chapman* was not conformable to reason, but if it had become a rule of property, it might be dangerous to alter it: that it had been quarrelled with by different judges, and that small circumstances had been relied on, to take particular cases out of the rule. 7. T. R. 595.

Lord Hardwicke says, he was counsel in it himself, and by

the note which he took on the back of his brief, *Ld. Macclesfield* laid a good deal of weight upon the particular penning of this will, if either of his nephews, William or Walter, should depart this life and leave no issue of their respective bodies ; these words must relate to the times of their death, and it would be a forced construction to have extended it to a dying without issue generally. 2 *Atky.* 818.

The question in such cases is, whether from the whole context of the will, we can collect, that when an estate is given to A, and his heirs forever, but if he die without issue, then over, the testator meant dying without issue living at the death of the first taker. The rule was settled in *Pells v. Brown*. It is a question of construction depending on the intention of the testator. 7 *Term. Rep.* 595, 6. As soon as the intention is known, there is an end to the question. Per *Lord Kenyon. Ib.* 557.

A devise of land to A, and his heirs and assigns forever, and if he die, leaving no issue behind him, then to B. over, is good by way of executory devise ; for the words if A. shall die leaving no issue behind him, are equivalent to the words, if A. die without issue, living W. (which was *Pells v. Brown's* case.) Besides here, the testator devised, that if B. died before A. and A. should not leave issue of his body, the lands should be sold and equally divided between the testator's six daughters ; which conveyed his idea, that this event was likely to happen in the life-time of his widow, or of his son B. or of his daughters. 3 *Term. Rep.* 143, 6.

So a devise to A. and his heirs forever, and in case he should depart this life and leave no issue, then to E. M. S., or the survivors or survivor of them, share and share alike ;—the devise to E. M. and S. is a good executory devise of the land. 7 *Term. Rep.* 589.

8. There is no doubt indeed, but that a word of conjunction in a will has been construed in the disjunctive, and *vice versa*, where it has been necessary to give effect to the testator's intention ; but not unless there be something in the will, from which it is to be collected, that the deviser did not use such words in the grammatical sense. 6 *Term. Rep.* 34. *Pollex.* 645. 1 *Sid.* 148 1 *Ld. Ray.* 506. 3 *Vin.* 187.

It has always been determined, that where an estate is given to a man and his heirs, and in case he die before 21 or without issue, then over, or is construed *and* ; for this plain reason, that if a contrary construction should prevail, the devisee might have a son born before 21, and if the father should die before 21, such son would be disin-

herited. 9 Mod. 445. 1 Wils. 140. 2 Stra. 1175. 1 Ves. 98.

9. In *Hopkins v. Hopkins*, Talb. Cas. 43, Lord Talbot decided in support of the intent, that a limitation, which in one event would have operated as a remainder, should on another event happening, operate as an executory devise. This he did upon principle, without precedents, and a great estate is said to be now held under it. Doug. 491, 2. 2 Fearn 496, 7. It was there resolved, that the limitation might take effect two ways. 1st. If T. dies leaving issue male, then the estate to the second son takes effect, as a remainder expectant, which may be barred; Or 2dly, Suppose the other alternative, (which really happened,) that T. has no son; then it is an executory devise to the second son, if T. at his death left no issue male. *Ib.* 490.

In 2 Vez. 289, 2 Fearn 390, another strong instance occurred, where it was held, that a devise may operate either way according to the event. Doug. 491. If he dies without issue before 21, then over, by way of executory devise; if he dies without issue after 21, when the estate vested in him, it would go by way of remainder; because he had made his original devise capable of a remainder, in which case the court will always construe it a remainder. In this case, Lord Hardwicke considered *and* as used for *or*, upon the apparent intent of the testator. The question directed by the Lord Chancellor, to be made for the opinion of B. R. was, whether the limitation to the plaintiff was good in the events which had happened. 7 Term Rep. 101.

I will now proceed to apply these rules to the case before us, recurring occasionally to the will.

The testator devises the land in question to his son Francis, his heirs and assigns forever, subject to the payment of 2300*l.* by instalments to the testator's son Peter, the last 50*l.* of which is payable in 1810. These words would give the fee to Francis most clearly, were there no other words in the will to control them. If Francis had a fee, the plaintiff is entitled to recover, as the lessor of the plaintiff is his heir at law, being his sister of the whole blood, and the defendant being the brother of Francis of the half blood only. This rule of excluding the half blood from inheriting lands, is peculiar to England, and was introduced in rude and unlettered ages, rather as a rule of evidence than of descent. There is no reason for adhering to it now, even there, when the title can be so easily deduced and traced from the first purchaser through the whole and half blood. 2 Black. 228. If there be no reason now for adhering to it in England, every man of common understanding must be surprised, that it is still a rule of property among us, who can with so much more ease, deduce our titles from

the first purchaser. However, as our legislature, although they had the point lately under consideration, have only altered the rule so far, that if the intestate have no brothers or sisters of the whole blood or their representatives, the brothers and sisters of the half blood shall inherit his real estate, under the very proper exceptions mentioned in the act of 4th April 1797, the rule excluding the half blood is still in force, as to the case before us.

The next clause in the will, is in these words: "but in case my son Francis shall die under the lawful age of 21 years, or without lawful issue, then and in that case, I give and bequeath my said son Francis's share in my said whole estate, unto my said son Peter, his heirs and assigns forever; and in case my said son Peter shall die under the lawful age of 21 years, or without lawful issue as aforesaid, then and in that case, I give and bequeath my said son Peter's share in my said whole estate unto my said son Francis, his heirs and assigns forever; but in either case, the survivor of my said two sons Francis and Peter shall then pay unto my daughter Elizabeth or her heirs, the sum of 500*l.* but to be taken out of the last payments of my first mentioned plantation."

The testator gives to Francis a large, and to Peter a considerable personal estate, and after the death of his wife, gives them the further sum of 600*l.* to be divided between them; and then the house in which she lived, to them in joint-tenancy.

He gives to his daughter, the lessor of the plaintiff, 1000*l.* including what he had before given to her and her husband, viz. 300*l.* besides what he had so given in six months after his decease, and 100*l.* per annum, till the whole should be paid; and he empowers his executors to sell a plantation of about 80 acres, and the money to go towards the payment of the said 1000*l.*

The law is clear, that where land is given to a man and his heirs, and in case he dies under 21, or without issue, the word *or* must be construed *and*, for the reason before stated. Were there no other words in this will, what evidence have we that the testator had in his mind a belief that Francis might marry and have a child before he arrived at the age of 21 years, and that therefore it was his intention to make provision for that event? When the will was made, Francis was 20 years and 8 day old. It was fairly inferred in the argument, that testators must be presumed to confine their provisions to such events as are probable, and not without some circumstances, are they presumed to extend provisions for events which are not probable, but merely possible.

In 2 Fearne 338, the words were general and comprehensive, extending in point of expression as well to his sons by any future wife, as to those by his present wife, in which case, the devise would have been void ; but as he gave his wife specific legacies, and made her one of his executors, it was held that he could not have sons by a future wife, in view, and therefore the devise could not extend to them.

We are not however, to be guided by inferences and probabilities only. We have sure guides in the words of this will.

I cannot agree to the position of the defendant's counsel, that the word *then* would of itself, be an adverb of time, confining Francis's dying without issue, to issue living at his death. I understand the law on this point thus : *then* is an adverb of time, when it refers to a thing or event, which must necessarily happen ; but not when the event is contingent. 2 Wms. 393, in note. 3 Co. 21, a. If it be contingent, *then* is a word of reference, and relates to the determination of the first limitation in the estate, when the contingency arises. 2 Atky. 311.

Nor do I think, that the next additional words " and in that case " would without more, make *then* an adverb of time. But when the testator goes further and says, that in either case " the survivor of my said two sons Francis and Peter shall then pay unto my said daughter Elizabeth or her heirs 500*l.* but out of the last payments, " &c. Can there be a doubt of what he had in view, or of his intention ? He directs Francis or Peter personally by name, as the one or the other should be the survivor, to do an act, to pay the 500*l.* To whom ? It is not confined to Elizabeth personally ; but to her or her heirs ; and why direct that the 500*l.* should be out of the last payments of his plantation ? Because the testator's idea was, that the event was likely to happen before April 1810. Requiring the survivor by name to do an act on the death of the other without issue, clearly confines the dying without issue, to issue living at his death. This is not a small circumstance, but is as strong language as a man not learned in the law could use, to take this out of the rule laid down in *Forth v. Chapman*, and so often repeated since. It is as strong, as if the testator had said, if Francis should die, living Peter, which is *Pells v. Brown's* case.

The words used here are surely as strong as leaving no issue behind him, then to B., which were held to make a good executory devise, as before stated in 8 Term Rep. 143. The words in that will, conveyed the testator's idea, that the event was likely to happen in the lifetime of his widow, or of his son, or of his daughters. Here the testator's idea is equally conveyed. that the survivor should have the

land on the death of his brother, without issue living at his death. Should it be contended that in the case last cited stress was laid on the words behind him, I answer that these words are not in the next subsequent case in 7 Term Rep. 589, in which there was a similar construction.

Then as the clear intention of the testator is expressed in this will, as the words dying without issue as explained by the subsequent words, must mean the same thing as if he had said, dying without issue living Peter, must *or* be construed *and* to effect the intention of the testator, in the event which has happened? For unless it be necessary so to construe this word, it must retain its grammatical sense. Had Francis died under 21, but had left issue, we must have construed *or* as if he had written *and* in the place, in order that the land should descend to his issue agreeably to the intention of the testator. But that event did not happen. Are we not therefore on the authority of the cases, which I have cited from Talb. Cas. 43, Doug. 490, 2 Vez. 249, 2 Fearn 190, 3 Bro. Ch. Rep. 85, equally warranted and compelled, in the event which has happened to adhere to the literal meaning of the word *or*! This will make it an executory devise to Peter the survivor, on which he is to pay Elizabeth 500*l.* in addition to the 1000*l.* devised to her before, and will give complete effect to the intention of the testator.

But it is said, this cannot be the proper construction, because as Francis arrived at the age of 21, he might have devised it, and that the restriction to sell, did not prevent the estate from descending.

To the first remark, I shall only answer at present, that this is begging the question. I shall give it a full answer, when I come to consider the codicil, in which the restriction is inserted. To the second, I answer, that it would indeed have descended to the issue of Francis, agreeably to the plain intention of the testator; but that it would have descended to the collateral heirs, is the very question in dispute.

I now proceed to consider the other part of the will, the codicil. Does it weaken or add force to the plaintiff's title, or to that of the defendant? The words in the codicil, material to the case before us, are these, viz: "And I do hereby order, particularly request, and do not allow my said son Francis to sell any part of the land, (which I have in my said will given him) until he arrives at the age of 30 years, and then he may do with the same as he pleases." Here the word *then* is an adverb of time, according to the distinction, which I have stated.

It is said, that the words of this codicil warrant the construction contended for on the part of the plaintiff, by saying "the land which I have in my said will given him."

I answer, he had indeed given him the land, but he had given it to him *sub modo*.

Again, it is contended, that by prohibiting Francis from selling the land until he should arrive at the age of 30 years, the testator conveys his idea, that he had given him such an estate as he could sell, after he attained the age of 21.

I answer 1st, the testator's belief, that he had given him such an estate, cannot alter the nature of the estate, which the words of the will convey, independent of that belief. But 2dly, supposing that by the words of the will, without the codicil, such an estate as he could sell or devise, and that it would descend after his arrival at the age of 21 years, the prohibition in the codicil is inserted for the express purpose of altering the nature of that estate. The words "and I do hereby order, and particularly request, and do not allow Francis to sell the land till he arrives at the age of 30 years," either have no meaning at all, no legal operation, and must be wholly rejected, or they are substantially and to all intents and purposes, a substitution of 30 instead of 21 years, as applied to the devise. The testator declares, that when Francis arrives at the age of 30, he may do with the land as he pleases. These words must imply, that before 30 he could not do with the land as he pleased, and therefore would not devise it, as was contended. I may add, that to contend that he might devise it, does not do justice to the memory of the testator, who throughout his will proves himself to be the affectionate parent to all his offspring. He shares his bounty among them in proportions well adapted to their relative circumstances, and to the eventual death of either son without leaving issue behind him, living at his death, giving in that event the further sum of 500*l.* to his daughter. Each of the survivors is to receive a further proof of his bounty; but if Francis could have devised it and had devised it, he might have completely defeated this evident intention of the testator; a harsh construction, which would have required words different from those in this will to warrant it.

Again; the estate was burthened with from between 1500*l.* and 1650*l.*, payable before Francis arrived at 30 years of age. It was asked, had Francis paid this sum to Peter, and died between 29 and 30 years of age without issue then living, was Peter, after having received this money, to have the land also? The question made a strong impression on my mind; it being impossible to believe that this could be the intention of the testator who shows himself throughout his will,

equally just and affectionate to all, and to each of his children. I am clearly and decidedly of opinion, that on such payment the fee would have vested in Francis. He might have devised it, but not having done so, the plaintiff in such case would be entitled to recover. This point is relied on by the plaintiff's counsel as conclusive. It would be so, unless a conclusive answer could be given to it, which is simply this: the event did not happen; not a cent was paid, or payable, at the death of Francis.

M. seized of lands in fee, of the value of 110l. a year, devised them to his sister M. F. for life; remainder to S. F. the daughter of M. F., paying to each of her sisters C. and D. 500l.; if either of them die, the survivor to have the legacy; if S. F. die, the land to be divided between the survivors, and in case all the three daughters die before their mother, then to the heirs of M. F. forever. Held, that C. and D. are each entitled to a moiety of the land in fee, on the contingency of surviving their mother M. F., and of their sister S. F., dying before she paid their legacies. Willes 128. Here S. F. died before her mother without issue. Had she outlived her mother, she would have taken the fee simple by this devise. The money which she is directed to pay, being near ten times the annual value of the estate, and the subsequent words, "if she die the land to go to her sisters," must be intended to if she die before she has paid the legacies. It would be absurd to say, that if she had lived to pay her sisters their legacies, and thereby become a purchaser of the estate, yet that she should only have it for life. *Id.* 142.

I have already stated, that of late years, executory devises have resembled contingent remainders, in all other respects, only they have been put under the restraints before specified, to prevent perpetuities. Here the testator, has rendered a perpetuity impossible; he has confined the contingency to less than ten years, after the making his will. And this circumstance alone, independent of all others, is a decisive answer to the questions on this point.

I have often thought, that a rule adopted in the construction of statutes, would in many instances give considerable assistance, if applied to discover the intention of a testator, and suppose he was present and was asked the question, what was your intention in the instance or event about which the dispute is? We will be generally safe, in giving a construction to his will, according to the answer, which he being an upright and reasonable man would give, if it be not contrary to any rule of law.

The question was asked during the argument; it was answered by another question; and it was contended, that the rule did not apply to

the construction of wills. I have however met with two instances, in which it has been applied by eminent judges. By Eyre, C. J. who observes, if it had been asked the testator, when he was making the disposition, what interest he meant, such son being in *ventre sa mere* &c. should have? I think he would have said, that such son should take a fee, &c. Bos. and Pull. 246-7. So by Wilmot, C. J. The court must put themselves in the place of the testator, and determine as he would have done. 2 Wils. 323. If he had been asked, &c. he certainly would have answered, &c. *Ib.*

We would therefore be warranted in calling this rule to our assistance, were any assistance necessary to enable us to discover the intention of the testator expressed in this will. We may suppose the testator present, and that he is asked, how he intends his lands shall go, if his son Francis reaches 21, but dies a few months afterwards, unmarried and without issue? The manner of his death is entirely out of the question. We may well suppose, that if he was a man of plain sense, but sound reason and understanding, he would smile at the question, and tell us, he had provided for that event, by as strong words as he knew how to use. He is told, that strong as his words are, legal ingenuity, by blending where there is little or no similitude, and distinguishing where there is no difference, may raise doubts, whether the words which he has used be sufficient to carry his intention in to effect; because decisions upon other words, somewhat like those in question, in other wills (though indeed the whole context of those other wills was not like that in the present) have defeated the intentions of testators, because there are technical terms, or magical words (not indeed understood by one testator in ten thousand) by the improper use whereof, or by using words in a sense in which they are clearly understood in every other instance, except in the construction of wills, the intentions of not a few testators have been defeated. Peter Shitz the elder, would no doubt reply, that his friends could not be serious: that when he served on juries, he had often heard lawyers and judges say, that law is the perfection of reason, and the better it is understood the more it is praised; that old people frequently attempted to have their land kept for many ages, nay, forever, in their own families; but the law showed its wisdom in saying this could not be done, because it would prevent property from answering the purposes of society, if it could not be sold when the interest of the owner requires a sale; and that he had completely guarded against this objection, in confining the restriction to the lives of his two sons, declaring, that on the death of one of them without issue, the

land should go to the other, whom he directed by name thereupon to pay his sister 500*l*. However in consequence of the suggestions of his friends, who never trifled with him, in two days after the will, he makes the codicil, to remove, as he believes, every possibility of doubt. When this is done, he dies in peace, and in perfect confidence, that in the event stated, his land would go to his younger son, and that 500*l*. in addition to the first legacy would be secured (out of the power of his eldest son to defeat, if he died without issue under 30 years of age,) to his daughter and to her children.

Another circumstance deserves notice. In England, in cases of intestacy, (and wills are generally made more or less in correspondence to the rules of intestacy,) the real estate goes into one channel, and the personal estate into another. With us, they flow in the same channel. Testators have the laws of their country in cases of intestacy, in their view when they make their wills. Therefore in all cases not perfectly clear, the laws of intestacy ought to have great weight in the construction of wills.

Again. In England, estates of inheritance are vested in a very few individuals indeed, comparatively speaking. Most of the owners are in the upper walks in life. Many of them are, and most of them ought to be, in some degree acquainted with the laws of their country. Most persons in their stations, make their wills deliberately, before they have any apprehension of danger of an early death, and few of them are without the assistance of counsel; all of them may readily obtain such assistance. 1 Fearn 260. The case is widely different indeed in Pennsylvania. Happily among us, a great majority of our farmers are landholders. We well know, that very few of them make their wills, until their last sickness. In very many instances, legal assistance could not be obtained in time; neither do persons in their stations in life, known that it is necessary. With only plain common sense for their guide, every man thinks that it is a very simple thing to declare who shall enjoy his property after his decease. If in England, the law relating to the construction of wills, as well as in other instances, be daily melting into common sense, more and more disentangled from the feudal fetters, which too long continued to enchain the understanding; if form gives way to substance, and justice be no longer entangled in a net of law, it would ill become us, to let a feudal drag-chain defeat the intention of a testator, expressed with a sufficient clearness and certainty in his will. That intention however, cannot be carried into effect, if it be contrary to any clear and settled rule of law, or any decision on the very point, in every circumstance which

become a rule and land-mark of property. For it is better, that the intentions of many testators should be defeated, than that the rules and land marks of property should be rendered precarious.

I have shown, that the intention of the testator in the present instance, is expressed with clearness in his will, that it is not contrary to any such rule or decision, and therefore it must prevail and judgment be rendered for the defendant.

Brackenridge, J. concurred.

Judgment for the defendant.

A writ of error was afterwards brought to the High Court of Errors and Appeals ; and the judgment reversed July 25 1807. 2 Binn. 232.

Negro PETER *against* WILLIAM STEEL.

Indebitatus assumpsit on a *quantum meruit*, will lie by a free negro for work, labour and service, against a person who held him in his service, claiming him as a slave.

THIS was tried at *Nisi Prius*, at Lancaster, before the late and present chief justice. The plaintiff declared in a general *indebitatus assumpsit* for work, labour and service, and on a *quantum meruit*. It was stated, that he was captured during the late revolutionary war, within the British lines, by the defendant then an American officer, and brought into Lancaster county. The defendant there registered him as a slave, and after being six months within the state, he was discharged by *habeas corpus*. The action was brought for remuneration for his services, after he had been six months within the state. The defendant at the trial, excepted to the form of the action, insisting that trespass was the proper remedy ; and the court directed a nonsuit, with liberty to move in bank to take it off.

It was argued last term by Mr. Wilson for the plaintiff, and Mr. Ingersoll for the defendant.

For the plaintiff, it was inserted that *indebitatus assumpsit* would well lie. The party may waive the tort and proceed for the money really due. Cowp. 416 419. 1 Burr. 21. 2 Ld. Ray. 1216. *Indebitatus assumpsit* for money had and received, is a liberal remedy. 2 Bl. Rep. 838. 2 Burr. 1012. The party waving the tort, may proceed on an implied contract. 2 Dall. 178. Proof of a lamb driven to London and sold, will support *indebitatus assumpsit*, unless in case of its being

stolen; for then trover would be the only proper action. Bull. 228, 4to. edit. It will apply to an action for the use and occupation of a house, for rent accrued, subsequent to the time of demise; and mesne profits may be thus recovered, though an ejectment is pending for the premises. Cowp. 246. Suit on a *quantum meruit* will lie for a negro claimed as a slave, but who was really free, for work, labor and service. Gilb. Evid. by Lofft. 878.

For the defendant, it was contended, that the proper specific remedy, provided by law in such a case, was an action of trespass *vi et armis*; or the point of slavery might be tried in a *homine replegiando*. It is admitted, that in some instances, the plaintiff may waive a tort, and go for damages; but the rule is not universal. *Indebitatus assumpsit*, in a case like the present, would be a surprize on a defendant. Nothing is spread on the record, to show that the point of slavery comes in dispute. Here the defendant claimed the plaintiff as a slave, taken in war, held him by force, and cannot be supposed to have agreed to pay him wages. An *assumpsit* will not be implied against the will of another; it must be grounded either on an express or implied consent. 1 Term Rep. 20. In an action for money had and received, there must be a privity between the parties; or there must be a *mala fides*, an unjust receipt of the money, or at least a receipt of it without valuable consideration. 2 Dall. 54, 5. In the case of the king of France against Robert Morris, esq., it was determined in this court, that a contract express or implied, must be shown, to support an action of account render; and the liability to account for the profits of an infant's lands, is an excepted case. Though a suit for money had and received is a favorite action in many cases, and resembles a bill in equity, yet it will not lie against an excise officer for an over-payment. Cowp. 69. Nor for money paid for the release of cattle damage feasant, though the distress was wrongful; or the verdict would not decide the right, nor would the defendant know how to shape his defence. B. 414.

Besides, a recovery in the present suit, could not be pleaded in bar to another action brought in trespass; and so the defendant might be doubly punished for one act.

Shippen, C. J. declined taking any part in the decision; and in this term Yeates, J. delivered the opinion of the court, as follows:

This is a motion to set aside a nonsuit, and the only question is, whether a free negro may not support, a general *indebitatus assumpsit* on a *quantum meruit*, for work, labor and service, against a per-

son claiming, or who formerly did claim to hold him as a slave?

On the part of the plaintiff it has been insisted, that where the party has two remedies given by the law, for an injury done to his person or property, he may elect which he pleases. That thought trespass and false imprisonment would lie, yet *indebitatus assumpsit* may also be maintained. That the party may waive the tort and go for the sum really due. 1 Burr. 21. *Cooper et al. v. Chitty et al.* 2 L. Raym. 1216. *Lamine v. Dorrel*. *Fellham v. Terry* cited Cowp. 416, 419. 1 Term Rep. 387. Bull. 128. *Simpson v. Gisling*, Cowp. 246. *Cheney v. Batton*, 2 Dall. 76, 78. *Haldane v. Duche's ex'tors*. And it has been said, that this form of action is a liberal remedy, like a bill in equity, entrapping no one in form. 2 Bla. Rep. 830. 2 Burr. 1012.

The defendant has contended, that trespass is the specific remedy pointed out by law, and that the point of slavery could only be tried in that form of action, or *homine replegiando*. That the defendant's holding the plaintiff by force is utterly inconsistent with a contract express or implied, which must be the ground of every *assumpsit*. 1 Term Rep. 20. *Stokes et al. v. et al.* *Lewis et al. Ib.* 387, *Birch v. Wright*. And that a recovery in this suit would not be a bar to a future action of trespass. That surprise might be occasioned to the defendant in this form of action, and he might not know how to shape his defence. *Assumpsit* will not lie against an excise officer for an over payment; Cowp. 69, *Whitebread v. Brookbank*; nor money paid for the release of cattle distrained for damage feasant, though the distress was wrongful. *Ib.* 414. To support the suit, there must be privity between the parties. 2 Dall. 54, 55. *Rapalje et al. v. Emory*.

I am not disposed to break in on the boundaries of actions, nor to make any innovation therein. If the defendant would sustain any inconvenience or difficulty in the present form of action, or the plaintiff derive any advantage therefrom, I should not feel inclined to support it.

The argument of surprise in the present suit is most powerful, if well founded. But is not a demand for work labor and service, an immediate notice to the defendant, that for such time as he claimed the plaintiff to be in a state of vassalage, compensation to a reasonable extent is sought for? Would trespass more thoroughly apprise him how to shape his defence, than the present form of action? On the general issue, the defendant may give every thing in evidence, which shows that the plaintiff has no right to recover. Indeed in actions for money had and re-

ceived, which is a most liberal remedy, the objection as to want of notice of the nature of the demand on the face of the pleadings, almost uniformly occurs; and yet such *assumpsits* have been sustained notwithstanding.

In *Astley v. Reynolds* (2 Stra. 915) detinue or trover was open to the plaintiff, when money was unlawfully extorted by duress of goods, and yet *assumpsit* was held to lie. In *Howard v. Wood* (Sir T. Jon. 126. 2 Lev. 245) and in *Arris v. Stakeley* (Mod. 260) it was held, that *indebitatus assumpsit* would lie for the rightful against the wrongful officer, for the profits of an office as for money had and received. In these cases it was objected, that *indebitatus assumpsit* would not lie for want of privity, and because there was no contract; it was only a tort, a disseisin, and the plaintiff might have brought an assize, and that the defendant took the profits against the will of the plaintiff. "There the question to be tried was, whether the grant of the office was good or bad, but that did appear from the form of the declaration; nor was it possible for the defendant to be apprized, what title the plaintiff intended to set up. Again, it was not the only remedy, for an assize will lie for an office." Cowp. 416. But the several objections were overruled by the court; because it is an expeditious remedy, facilitates the recovery of just rights, and this manner of action had long prevailed. 2 Jon. 128.

In *Hitchin v. Campbell*, (2 Bla. Rep. 829, 830) it was determined that *indebitatus assumpsit* will lie for the assignees of a bankrupt against a creditor who has levied his debt by *fiери facias*, subsequent to the act of bankruptcy. There Lord Chief Justice De Grey observed that "practice had certainly much extended the action of *assumpsit*, as a very useful and general remedy. While the action was in its infancy, the courts endeavoured to find technical arguments to support it as by a notion of privity, &c. yet that principal is too narrow to support these actions in general, to the extent which they are admitted. The assignees might have their election or bring either tort or contract, yet they could not bring both; and having elected to bring trover, the judgment in that, bars the action of *assumpsit*."

In *Lamine v. Dorrel*, 2 L. Ray. 1216, the court held, that if one takes goods to which he has no right, and sells them, the owner may waive the tort and recover the price for which they were sold in *indebitatus assumpsit*, and that it did not differ from *assumpsit* for the profits of an office. Lord Chief Justice Holt remarks, that "the defendant may plead recovery in this suit in bar of an action of trover; because

by the *indebitatus assumpsit*, the plaintiff makes and affirms the defendant's act to be lawful; and consequently the sale of the goods is no conversion." This reasoning is highly applicable to the case before the court. That a plaintiff may dispense with a trespass or wrong, and proceed for the sum really due, is I apprehend too well established by the cases cited and others, to be now shaken. But he shall not blow both hot and cold at the same time. 1 Term Rep. 387.

I proceed now to consider and remark on the authorities adduced by the defendant's counsel.

In *Whitebread v. Brookbank*, Cowp. 69, Lord Mansfield said "it might be of great inconvenience, if the case should hereafter be made a precedent, that an action for money had and received will lie against an officer of revenue for an over payment." The resolution therefore is founded on principles of general policy, the revenue being materially interested in the construction of the statute of 1 Geo. 3. c. 7. § 6, granting a bounty on the exportation of beer, made from malted corn. The present is a mere controversy between individuals.

In *Lindon v. Hooper*, Cowp. 414, it was held that an action for money had and received, does not lie to recover back money paid for the release of cattle damage feasant, though the distress were wrongful. The reasons are given; the case is singular and depends on a peculiar system of strict positive law, which has provided two precise remedies, replevin or trespass, in both of which the plaintiff must specially reply a right of common or some other title, as a justification of the cattle being where they were taken. "But if assumpsit might be brought in such a case, the defendant might be surprised at the trial.

He could not be prepared to make his defence; he could not tell what sort of right or common, or other justification the plaintiff might set up. The plaintiff might shift his prescription as often as he pleased, or he might rest upon objections to the regularity of the distress. The plaintiff can never be suffered to throw, such a difficulty upon his adverse party. Besides as applied to the subject matter of this question, the action for money had and received could never answer the equitable end for which it was invented, and deserves to be encouraged. For the point to be tried therein, whether the plaintiff's cattle trespassed on the defendant's land, may depend on the plaintiff's right, or defendant's right, or the fact of trespassing, or it may depend on mere form. It would be unequal and unjust, as between the parties, to suffer assumpsit to be substituted in lieu of an action of trespass, and would create inconvenience by leaving rights of common open to repeated litigation.

and depriving posterity of the benefit of precise judgments upon record."

Lord Mansfield further observed, that "there was a material distinction between the case then before the court and the instances alluded to at the bar, where the plaintiff is allowed to waive the trespass and bring the action for money had and received. In the latter, the relief is more favorable to the defendant. He is liable to refund only what he has actually received, contrary to conscience and equity; and the plaintiff, by electing this mode of action, eases the defendant of special pleading, and takes the risk of being surprized upon himself."

On the most careful consideration of this case, I am satisfied that not a single reason which influenced the court's decision in *Lindon v. Hooper*, applies to the case now before us; and that all the grounds of suffering assumpsits to be brought where the wrong is dispensed with unite in the present instance, and fortify the mode of action which has been pursued.

The observation of the court in *Rapalje et al. v. Emory*, 2 Dall. 54, 55, goes merely to the identifying of money and tracing it into the hands of an utter stranger, according to the distinction laid down in *Cowp.* 200.

Where one does work for another by compulsion, whom he is under no legal or moral obligation to serve, the law will, I think, imply and raise a promise on the part of the person benefited thereby, to make him a reasonable recompence; and as I have not been able to discover any solid ground of objection against the plaintiff's sustaining the form in which this action has been conceived, I am of opinion that the nonsuit should be set aside, and the costs to await the determination of the suit. Of the merits of the plaintiff's demand, the jury are the constitutional judges.

Smith and Brackenridge, Justices, concurred.

Nonsuit set side and new trial awarded.

On the ensuing day, Smith, J. expressed himself thus During the recess of the court, I employed myself in examining this case with more attention than I had done before. I do not hold myself bound by the opinions of any judges, however eminent, further than such opinions accord with my own judgment, unless those opinions have become rules of property: but I certainly will not, without due consideration, dissent from the opinion given by another judge, especially by the late and present Chief Justice. Where they have both joined

in an opinion it behoves me to weigh it with all the attention which my abilities enable me to give it, before I give an opposite opinion, and to support such opposite opinion on clear principles of law. Both the Chief Justices joined in opinion, that the present action cannot be supported and directed a nonsuit.

After my opinion had long waived, I declared that the inclination of it was, that the nonsuit should be set aside. Although that inclination still continues, in order that the question may be more deliberately discussed, my judgment is not satisfied.

I have duly considered all the cases. Not one of them in my opinion completely applies. In all of them, the benefits acquired by the defendant were without or against the will of the plaintiff. In the present case, it does not appear to us that the plaintiff served the defendant by constraint, or continued by his bare permission to reside with him: it does not appear that the defendant would have kept the plaintiff in his house, if he had supposed he would have claimed wages. The probability is, that the detention was founded on a mistake of both sides. If the merits can be completely gone into in the present form of action we ought not to turn the parties round to another action, but we ought to enable them to enter fully into the merits; for which purpose I propose this addition to the rule to set aside the nonsuit, that the parties be at liberty to plead specially, or to add the plea of the statute of limitations. Unless this addition be made to the rule, I withdraw my consent to it.

It is as much my delight as it is my duty, to correct any opinion, which more mature consideration leads me to think liable to objection as it is to be decisive, when I am convinced that my opinion is well founded.

Yeates and Brackenridge, Justices, readily agreed to the addition to the rule, that the defendant should be at liberty to plead *de novo*, and the rule to set aside the nonsuit was made absolute.

THOMAS FISHER *against* JOHN HYDE.

One arrested after being discharged under an insolvent act of New York, whose courts do not respect discharges under the Pennsylvania bankrupt or insolvent act, shall not be discharged on common bail.

THE defendant was arrested on a *capias* out of this court, and in September term last, Mr. T. Ross obtained a rule to show cause why he should not be discharged on common bail. He then produced the discharge of the defendant, on the 7th April 1797, by Morgan Lewis esq. one of the judges of the Supreme Court of Judicature of the state of New York, (under an act of assembly of that state, passed 21st

March 1788, giving relief in cases of insolvency,) from all debts due at the time of his assignment, or contracted for before that time, though payable afterwards. The defendant relied on the case of Hilyard and Pippet v. Greenleaf, in this court, March term 1800, wherein the then defendant was discharged on common bail, in consequence of his being discharged under an act of insolvency, passed in Maryland. The court there considered themselves bound by the decision of Miller v. Hall, (1 Dall. 229,) and governed themselves accordingly. That and the principle case are precisely similar.

Mr. Rawle for the plaintiff showed cause. This is an action of trover for certain bonds delivered to the defendant, and the evidence of conversion is subsequent to his discharge under the New York laws. Besides the courts of New York do not regard discharges either under our bankrupt or insolvent laws. This appeared in the case of Thomas Nixon v. Charles Young, tried in this court in December term 1796. There the defendant, after judgment recovered against him in the Mayor's Court of New York, obtained a certificate of conformity under a commission of bankrupt issued against him in Pennsylvania. He was afterwards taken in execution on the judgment, and applied to eminent counsel to obtain enlargement under his certificate, but was assured, that the Mayor's Court would pay no regard to his certificate. Besides this, the Supreme Court of the United States, in two late instances, Emory v. Greenough, and Greenleaf v. Banks, * have shown a strong inclination to disregard certificates of conformity to the

* The reporter has been favored by Mr. Tilghman, with the following statements of these cases :

Samuel Emory, a citizen of Massachusetts Bay, entered into a contract with Greenough, of the same state. Emory removed to Pennsylvania, because a bankrupt, and obtained a certificate. Emory being found in Massachusetts, was arrested by Greenough, on the contract in Massachusetts. Emory pleaded the certificate in bar, and judgment was rendered in the Circuit Court of the United States for Greenough. Emory brought a writ of error, and the same was argued in the Supreme Court of the United States, by Lewis Ingersoll and Dallas, for the plaintiff in error, and by E. Tilghman, for the defendant in error. The court inclined strongly in favor of the defendant in error. Mr. Ingersoll was to argue the case further, but the judgment was reversed, the Supreme Court of the United States being of opinion, that there did not appear a jurisdiction of the cause in the Circuit Court, the plaintiff there not being stated to be a citizen of Massachusetts Bay.

Greenleaf v. Banks. In Supreme Court of the United States, February term 1800. Error to the Circuit Court of Virginia. Greenleaf had been discharged under a special insolvent law of Maryland, and pleaded that discharge in bar. But judgment was given for Banks in the Circuit Court of Virginia. On error brought, the cause was to have been argued by Ingersoll and W. Tilghman, for the plaintiff in error, and by E. Tilghman, for the defendant in error, but there being only four judges

bankrupt laws, or discharges under the insolvent acts of one state, when pleaded in bar of debts in another state.

The court said, they well recollected the circumstances disclosed in *Nixon v. Young*; and unless it clearly appeared, that the courts of New York paid regard to discharges under our bankrupt and insolvent laws, they declared that on principles of reciprocity, they could not respect discharges under their laws. At the instance of the defendant's counsel, they gave further time to make inquiries as to this point.

The argument being resumed this term, and it being admitted that by the practice of the courts in New York, no regard was paid to certificates of bankruptcy under the laws of Pennsylvania, the court discharged the rule, and directed that the defendant should give bail.

J. L. BUJAC, indorsee of BENJAMIN MORGAN *against* BENJAMIN MORGAN.

Services of a summons by leaving a copy with defendant's partner, with whom he has lived, before he went abroad on a trading concern, from whence he is daily expected to return, and has his children now living with him, is good.

SUMMONS case. Sheriff returns summons served by leaving a copy with Chandler Price, the defendant's partner, at his last place of abode. Rule to show cause, why the service of the summons should not be set aside.

It was admitted by Mr. Todd for the plaintiff, and by Mr. M'Kean for the defendant, that the defendant carried on business in the city with his partner Price, lived with him until he went on a trading concern to the Natchez one year ago, from whence he is expected back daily, and that his children now actually live with him.

Per cur. The defendant cannot be arrested, because not within the state; he is not subject to a domestic attachment, because he has not absconded; nor to a foreign attachment, because clearly he is an inhabitant of the state. 1 Dall. 153. His home is within the city of Philadelphia.

The rule must be discharged.

on the bench, and two of them declaring that they had given judgments similar to that in question, the cause was continued. In August term 1800, Greenleaf having learned, that the opinions of a majority of the judges had been given against him, discontinued the cause.

It was supposed to have been an amicable matter between Greenleaf and Banks, in order to settle the question. Mr. E. Tilghman intended to have made a particular objection to the law of Maryland, that the same ought not to be respected by a sister state, if the argument had been proceeded in.

AT A CIRCUIT COURT, AT CHAMBERSBURGH, OCTOBER
1801.CORAM, YEATES AND SMITH, JUSTICES.

JOSEPH COOK *against* JOHN NEAFF.

Owner of a slave entering his negro in the county wherein he lives, without expressing the county, the registry is valid. In a suit for the consideration of a slave recommended as honest, purchaser cannot give evidence of his being suspected of felony.

CASE on two promissory notes, the one for 20*l*. the other for 50*l*. payable on different days.

The defendant purchased a mulatto named Bob, from the plaintiff as a slave for life. He contended, that the registry of him was imperfect and invalid, and that he was entitled to his freedom, the entry by the clerk of the peace of Cumberland county, (before the county of Franklin was taken off from it,) omitting the county of Cumberland, wherein the owner lived, and being in these words: "23d October 1780, Bob, a mulatto slave for life, aged 6 years, entered by Joseph Cook of Antrim township, farmer." The transcript of the record was not on stamped paper, agreeably to the act of congress of the 6th July 1797.

By the court. We cannot receive the paper offered to us in evidence, the same not being on stamped paper, as the act of congress directs. But admitting that we had the entry duly before us, we have no doubts of its validity, though the county is not expressed therein. It is agreed, that Cook lived in Cumberland county at the time, and we know of no other county, which contained a township named Antrim in it. He has delivered to the clerk of the peace of the county in which he inhabited, his name, surname, occupation, place of residence, the name of his slave for life, his age, &c. All the evils intended to be guarded against by the legislature, in the act for the gradual abolition of slavery, are obviated by this return and it would be an unwarrantable refinement to say, that under such a registry, the mulatto was entitled to liberty.

The defendant then proved by a witness, who was present at the sale, that the plaintiff had highly recommended the slave, and sold him as a trusty, honest fellow; and offered to show by another witness, that in consequence of his being suspected of felony committed before the sale, he was taken from the service of the defendant.

But the court said, there was a material difference between the local circumstances of this state and of Great Britain. It would be an outrage on common sense to suppose, that what would be deemed waste in England, could receive that appellation here. Lands in general with us are enhanced by being cleared, provided a proper proportion of woodland is preserved for the maintenance of the place. If the tenant in dower clears part of the lands assigned to her, and does not exceed the relative proportion of cleared land, considered as to the whole tract, she cannot be said to have committed waste thereby.

Verdict for the demandants.

Mr. Bowie, for the demandants.

Mr. Hamilton, for the tenants.

AT A CIRCUIT COURT, AT SOMERSET, OCTOBER 1801.

CORAM, YEATES AND SMITH, JUSTICES.

PETER KIMMEL *against* JOSEPH LICHTY.

If one sells an unsound horse, knowingly, and conceals that circumstance and receives a sound price, he is answerable for the deceit; *aliter*, if he was ignorant that the horse was unsound: but if one sells with warranty, he is answerable, whether he knew the horse to be unsound or not.

CASE for selling an unsound horse, the defendant affirming him to be sound, though he had at the time of sale the disorder called the yellow water.

After arguments of counsel, the court declared the law to be, that where one sells an unsound horse, knowing him to be disordered at the time of sale, and conceals that circumstance from the purchaser, but receives a price from him, which the purchaser would not have consented to give, unless for a sound horse, the vendee may recover damages from the vendor for this deceit; *aliter*, where the seller was wholly ignorant of the horse's being disordered. But if one sells a horse, warranting him to be sound, the contract will bind the vendor, whether he was ignorant at the time of the horse's being disordered or not.

Verdict for the defendant.

Messrs. Woods and Riddle, *pro quer.*

Messrs. Dunlap and Weigley, *pro def.*

Vide 1 Pow. Contracts 150. 1 Lev. 102. 1 Sid. 146. 1 Salk. 211. 2 Ld. Raym. 1118. Yelv. 20. Cro. Jac. 4. Espin. 629.

BERLIN ROAD.

The review of a road is a matter of right.

ON a *certiorari* to remove all proceedings respecting a road, from the town of Berlin to Leidig's mill.

It appeared, that on a petition for the road to September sessions 1800, viewers had been appointed, who returned to the December sessions following a certain road by courses and distances for and as a public road. That the court continued the return under advisement until February sessions 1801, when a petition was presented for a review, which the court rejected and confirmed the return: It was now said, that the review had been prayed for by persons who were not interested therein; but on examination of the duplicates of assessments, the assertion appeared to be unfounded.

The court now reversed the proceedings because the petition for the review by several of the inhabitants of Southampton and Brother's Valley townships had been duly filed, previous to the road's being confirmed. It has been long settled, that the review of a road is a matter of right. See 1 Dall. 11.

AT A CIRCUIT COURT, AT UNIONTOWN, OCTOBER 1801.

CORAM, YEATES AND SMITH, JUSTICES.

RESPUBLICA *against* LEVI ARNOLD, BENJAMIN ARNOLD and JAMES ARNOLD.

Habeas corpus under the act of 1785, does not lie to the bail of one charged with a criminal matter.

If persons indicted keep the state witnesses out of the way, they are not entitled to be discharged, though two sessions have intervened, under the act of 1785.

ON motion for a *habeas corpus*, the deposition of Levi Arnold was read, stating, that on the 3d February 1801, Benjamin Arnold and himself were committed to the gaol of Fayette county, on suspicion of burning the barn of Nathaniel Breeding, esq., or being accessaries thereto, and that James Arnold was admitted to bail; that at the March sessions following, an indictment was found by the grand jury against Joseph Gains, as principal in the said arson, and against himself and the two defendants as accessaries before the fact; in the Court

of General Quarter Sessions of the peace ; that a precept for holding a Court of Oyer and Terminer and General Jail Delivery, issued to the June sessions following, when the defendants were ready for their trial with their witnesses ; but that Cairns, the principal, not being taken on the process, the indictment was continued and the defendants admitted to bail ; that another Court of Oyer and Terminer was held in September sessions following, when the defendants were again ready for trial with their witnesses, but Cairns having fled, the trial was postponed, and the defendants again entered into recognizances for their appearance.

The court remarked, that application should be made to the justices of Oyer and Terminer for relief. If there was no prospect of apprehending the principal, and no special circumstances could be shown against the defendants, such as concealing of the principal, or keeping him or the witnesses out of the way, they would certainly discharge the defendants from bail, as was done in the case of *James Young v. Jack*, in Franklin county, or if they deemed them to be dangerous characters, would bind them over to the peace.

The counsel on both sides answered, that this application had been made and refused, and that they had been expressly referred to this court, by the justices of Oyer and Terminer, at their last sessions.

Several depositions were then read, tending to show on the part of the defendants, their innocence and the improbability of the charge made against them ; and on the part of the commonwealth, that the defendants had threatened the state witnesses, and assisted in the escape of Cairns, the principal, from justice.

Mr. Ross for the defendants moved, that a *habeas corpus* might issue to the bail, that they might be discharged from their recognizances. The defendants were, in a legal sense, under actual confinement and restrained of their liberty ; their bail might surrender them. The 3d section of the act of 18th February 1785, expressly directs, that if a person committed for treason or felony, shall not be tried the first sessions after his commitment, he shall on the last day of the sessions be admitted to bail unless it shall appear, that the witnesses for the commonwealth could not then be produced ; and if he shall not be tried at the second sessions, unless the delay happen on his application, or with his consent, he shall be discharged from imprisonment. 2 Dall. St. Laws 243. This law is obligatory on the court and takes away all discretion. It is couched in strong

terms, "it shall and may be lawful for the justices, and they are hereby required," &c. Should a defendant be guilty of improper practices, by tampering with witnesses, or preventing their appearance to give evidence, he is obnoxious on that score to a prosecution for the misdemeanor, but is legally entitled to a discharge from the crime laid against him. Here the indictment originated in the Quarter Sessions, and two sessions of Oyer and Terminer have passed over without bringing the defendants to trial.

Mr. Campbell for the commonwealth opposed the motion. Here has been no oppression, or unreasonable delay on the part of the state. It is a well known principle of law, that accessaries cannot without their consent, be tried before the principal. They have refused that consent, and therefore have no grounds to complain of the delay.

The 3d section of the act extends only to principals, not to accessaries; the words are "if any person shall be committed for treason or felony," &c. Nor does this part of the act, (which is borrowed from the British statute of 31 Car. 2, c. 2, called the *habeas corpus* act, 3 Ruff. stat. 397) refer to any other cases, than where the party applying is in gaol, in actual custody. The first section runs, "if any person shall be or stand committed or detained for any criminal or supposed criminal matter," &c. The *habeas corpus* is to be directed to the person in whose custody the prisoner is detained; there is to be a payment or tender of the charges of bringing the said prisoner, &c., the word prisoner being used throughout this section, and also, in the 2d and 3d sections.

Besides, it has been proved by the depositions, that highly improper threats have been thrown out by the defendants against the witnesses on the part of the prosecution, and there are strong colorable grounds to believe, that they have aided in the escape of the principal offender. Under such special circumstances the Court of Oyer and Terminer clearly possessed the power of continuing the parties under recognizance.

By the court. There can be no difficulty in saying that if principals, the superior offenders, are entitled to the benefits of the law of 1785, the accessaries, who are in inferior grades of criminality, must have the same pretensions.

Yeates, J. was of opinion, that the second objection on the part of the commonwealth was well founded. The provisions in the first twelve sections of the law of 1785, all go to the cases of person

committed or detained for any criminal or supposed criminal matter, to prisoners in actual custody of some officer of justice.* The 13th and 14th sections are not to be found in the British statute of 31 Car. 2, c. 2,† and are valuable improvements of the rights and liberties of citizens ; but they do not respect commitments for criminal matter. The 3d section of the act directs that the justices of Oyer and Terminer shall on the last day of the term, next after the commitment of the party who shall not be indicted and tried, set at liberty the said prisoner, upon bail, &c. This clearly shows, that the legislature did not contemplate a party admitted to bail, as a prisoner under commitment, besides confining the authority and requisition so to act, solely to the court, before whom the prisoner is to receive his trial. Would not a *habeas corpus*, directed to the bail of a supposed offender, be perfectly novel ? Could we or either of us do an act, which would amount to a legal discharge of the recognizances in the court of Oyer and Terminer ?

Smith, J. said, that the inclination of his mind was, that the *habeas corpus* would not lie to the bail ; but declined giving any decided opinion on the point.

By the court. We have no doubt of the powers of the court of Oyer and Terminer of retaining the defendants under bail, to answer the indictment, if their minds were satisfied, either that the witnesses were kept out of the way by the procurement or threats of the defendants, or that they had prevented the arrest of the principal. It would be monstrous to suppose, that the parties by their own improper conduct, should elude the punishment for a superior offence, by subjecting themselves to a prosecution for misdemeanor. We must refer the defendants to the Court of Oyer and Terminer, who are best acquainted with the circumstances of the case. There they will not be treated with oppression ; but if the public interests and safety require it, they will administer that preventive justice, which the laws of the government empower them to exercise.

Motion denied.

*A constable is within the *habeas corpus* act. 1 Stra. 167

†Vide new ed. of Bac. Abr. Vol. 3. p. 18.

**WILLIAM ROBINSON assignee of ALEXANDER ARMSTRONG against
BENJAMIN BEALL and HENRY RUSSEL.**

Bond by A and B to C assigned to D. A joint bill by E and C assigned after the death of E to A before assignment to D is a good set-off against the bond sued by D.

CASE stated for the opinion of the court.

On the 20th July 1800, the present suit was commenced on a bond given by the defendants to Armstrong, dated the 6th May 1799, and duly assigned to the plaintiff on the 30th June 1800.

The defendants plead payment with notice of a set-off. They claim a defalcation of a joint bill by William Cameron (since deceased) and Alexander Armstrong aforesaid, to Andrew Baine, for the payment of 86*l.* 5*s.* 6*d.* on the 9th October 1799, and duly assigned to the said Benjamin Beall on the 28th February 1800. Cameron the co-obligor died before the times of either of the assignments.

The question submitted to the court was, whether the bill in the hands of Beall the defendant, ought not to be allowed as a set-off against the bond in the hands of Robinson the plaintiff?

Mr. Kennedy for the plaintiff objected, that the bill intended to be defaulted, was joint and between other parties, viz. Cameron and Armstrong as obligors, and Baine as obligee. The demands must be mutual, and such as are due in the same right. Bull. 175. Espin. 439. No set-off is allowed, where the demand is in *auder droit*. *Ib.* 1 Vez. 208. 2 Espin Rep. 594. It is true, there are exceptions in the cases of surviving partners. A debt due to a defendant, as a surviving partner, may be set off against a demand on him in his own right. 5 Term Rep. 493. Because, the defendant might have declared against the plaintiff for this demand, and also for any sum due to him separately, if any such had been due. *Ib.* 3 Term Rep. 433. So a debt due from the plaintiff as surviving partner, to the defendant, may be set off against a debt due from the defendant to the plaintiff in his own right. 6 Term Rep. 582. But these cases are distinguishable from the present. Besides, this is the case of a *bona fide* assignment.

Mr. Lyon for the defendant answered, that the plaintiff by his assignment took the bond subject to all the equity and defalcation, which it carried in the hands of the obligee. Cameron died before his bill was assigned in February 1800, and the remedy by Beall the assignee was transferred solely as against Armstrong. The joint nature of the bill was destroyed by Cameron's death. And Beall possessing this demand

against Armstrong antecedent to the assignment of the bond by the latter to the plaintiff, must be entitled to a defalcation. Armstrong's assignment would not put Beall in a worse situation, than he was before.

By the court. There can be no doubt, but circumstanced as this case is, the bill is a good set off against the bond.

AT A CIRCUIT COURT, AT WASHINGTON, NOVEMBER 1801.

CORAM, YEATES AND SMITH, JUSTICES.

Lessee of EDWARD SAMMS *against* HENRY ALEXANDER.

Evidence of the debt, on which a sheriff's sale of lands was founded, being paid previous to the sale, shall not be received to effect the title of a stranger who has purchased. Aliter, if the plaintiff in the execution is the purchaser.

EJECTMENT for 100 $\frac{1}{2}$ acres in East Bethlehem township.

The plaintiff claimed under a warrant of 8th March 1786, and a survey thereon made 30th September 1787.

The defendant claimed under a judgment obtained against Samms, in March term 1787, a *fieri facias* to July term 1787, whereon the lands were levied, and a sale by James Marshall, esq. then sheriff, under a *venditioni exponas* to October term 1787. William Wallace esq. the succeeding sheriff, by order of the Court of Common Pleas, executed the deed to the defendant, in consideration of 10*l.*, February 8th 1792.

The plaintiff proposed to prove, that the debt had been fully paid to Thomas Stokeley, the plaintiff in the execution, previous to the sheriff's sale, but admitted that no notice hereof could be traced to the defendant.

The court said, it was impossible to receive such evidence, however hard the case might appear. If sheriff's sale could be avoided by such objections, it would produce the most fatal consequences. The defendant had paid his money, without being apprized of any dispute, confiding in the regularity of the court proceedings. If indeed Stokeley, the plaintiff, had brought at the sheriff's sale, this evidence, might have been gone into, according to the authority of *Goodyer v. Junce*, Yelv. 179 ;

but it is clearly otherwise as to a stranger. The lessor of the plaintiff had ample time to move the Court of Common Pleas to set aside the sale, and it was his neglect and folly not to have done it. The evidence was overruled, and the jury gave a verdict for the defendant *instantly*.

Mr. Pentecost, *pro quer.*

Messrs. Ross and Campbell, *pro def.*

Lessee of JOSHUA CLARK *against* GEORGE HACKETHORN.

A settlement right may be affected by the conduct of the widow of the settler.

An agreement by a widow in 1786, that a person securing to the family one half of the land improved, by a legal title, shall have the other, may be valid in certain cases

The 5th section of the limitation act of March 26, 1785, is binding on infants.

A purchaser for valuable consideration without notice of a trust, is not subject to it.

EJECTMENT for 159 acres and 92 perches of land in Hanover township, brought to November term 1799.

The facts on the trial appeared as follows: Masterton Clark settled on the lands in question in 1775, built a cabin 16 feet by 14, cleared 11 or 12 acres that year, planted corn in the spring, and sowed wheat in the fall. Next year he cleared 7 or 8 acres more, and planted corn therein; he lived on the land two years with his wife and children, and was driven off by the Indians in 1777, went to Redstone, and died in 1783. Previous to his death, by his will dated 5th July 1783, he devised to his wife Mary the profits of his lands, until his eldest son (the lessor of the plaintiff) should come of age, and then his said son to have two thirds thereof in fee, and his said wife to have the remaining one third during her life. The land lay waste till 1789.

On the 15th February 1786, the widow entered into an agreement with James Marshall, esq. then sheriff of the county, that he should take out an office right for the lands, and procure the same to be surveyed and patented, convey one moiety thereof to her son Joshua in fee, and retain the other moiety for himself. It appeared that Marshall entered into this contract with the widow at her express request, and by the advice and approbation of her brother George Blazier, and that he intended thereby to secure a plantation for the family, and merely to indemnify himself. He relinquished his interest in the lands to Samuel Smith, after procuring a warrant, which was conveyed to Smith, subject to the above agreement. Smith obtained a patent for the land, containing 404 acres and 32 perches, on the 16th April 1788, and the legal title to the lands in question became vested in the defendant under four different mesne conveyances, and the residue of the lands, con-

taining 245 acres and 100 perches, were conveyed to the widow, in trust for the uses in the will.

The lessor of the plaintiff was eight years old when his father died. His mother afterwards intermarried with Mark Duke, and they came into possession of the lands conveyed to her in 1789, but had no possession of the 159 acres and 92 perches.

After the cause had been argued very fully by Messrs. Pentecost and Simonson on the part of the plaintiff, and by Mr. Ross for the defendant, the court informed the jury in their charge, that four different questions might come before them for decision on the evidence.

1st. Has there been an abandonment of the settlement right? The leanings of the court were strongly in favor of actual settlers. The law of 30th December 1786, was declaratory of the ancient law and usage on this subject. But though *bona fide* improvements would receive every protection if duly pursued, they might be lost by delay and neglect. A widow, even with infant children, might do acts amounting to a dereliction; by gross negligence she might bar their pretensions to a settlement claim. The state of the country was well known. In 1777, the inhabitants fled from the savages; in 1782, there was no real danger from the Indians; but the public fears had not subsided until 1783; all apprehensions of danger then ceased; but this original settlement was not continued until 1789, and here is a laches of six years.

2d. Was the widow's contract with Marshall invalid? In 1786, courts of justice did not regard settlements in the favorable light in which they are now viewed; they were often in jeopardy. It was no more than prudent to secure part of the land by a legal title; the widow had no resources to effect this, except by such an agreement. She consults her brother, and he advises the measure. Marshall meant only to serve her, and gains nothing by it. Suppose a decision of the Supreme Court in 1786, in favor of an office right against the present settlement claim, and a person had purchased the paper title in consequence of such decision, and confiding therein, could he now be dispossessed? Are not the two cases the same in principle?

3d. Duke and his wife, in the year 1789, took possession of the old improvement, but not of the tract now in dispute; consequently, as the plaintiff claims under an improvement, and he cannot ascertain a possession within seven years previous to the commencement of this ejectment to November term 1799, he is barred from recovery by the express words of the limitation act of 26th March 1785, § 5. (2 Dall. St. Laws 282.) It has been determined, that this law is binding on infants in Mobley's *et al.* lessee *v.* Ecker, in Huntingdon county, at the last spring cir-

on full consideration, where the two former points also underwent discussion.

4th. On another ground we think the plaintiff must fail. He must recover, if at all, against the defendant as his trustee; but if Marshall and Smith were in the first instance trustees for the lessor of the plaintiff, the several subsequent purchasers for valuable consideration, without notice of the trust, are not subjected to it. 2 Com. Dig. 231. 5 Com. Dig. 584. 1 Co. 122, *b.* 5 Bac. 342, 387. Talb. Cas. 187, 258, 260. 1 Wms. 128. The trust could not descend on the defendant without notice; and there was no adverse possession which would amount to constructive notice. 2 Bla. Com. 337. 2 Fonbla. 170.

The jury gave a verdict for the defendant without leaving the bar.

JAMES CAMPBELL *against* HERBERT WALLACE.

Parol evidence will not be received to prove the contents of written papers, unless they are proved to be lost, or in the possession of the adverse party.

Indebitatus assumpsit for 106*l.* had and received to the plaintiff's use. Pleas, *non-assumpsit* and payment, and the act of limitations.

The suit was brought to recover back the price of two negroes, sold as slaves, alleging that the consideration failed.

The plaintiff's son, in giving testimony, said, his father had received a bill of sale from the defendant for the negroes, but on looking for it amongst his papers, he could not find it, nor did he know where it was, and that his father was in so weak a state of body that he could not attend the court.

On an objection being taken to this evidence, the court said, that whoever would give parol testimony of the contents of a deed or other instrument, must entitle himself thereto, on the grounds of its being lost or destroyed, or being in the possession of the adverse party, and that notice had been given to him to produce it. The law abhorred nothing more than giving parol evidence of written papers, and it was only tolerated on the principle of necessity, which must be clearly shown to the court. Though the son might not know where the bill of sale was to be found, the case might be otherwise as to the father; and though the latter was unable to attend court, yet his affidavit of the loss of the paper before a magistrate would be received by the court on this collateral fact.

The plaintiff suffered a non-suit.

Mr. Campbell, *pro quer.*

Messrs. Ross and Simonson, *pro def.*

AT A CIRCUIT COURT, AT PITTSBURG, NOVEMBER
1801.

CORAM, YEATES AND SMITH, JUSTICES.

Lessee of JOHN NICHOLLS *against* WILLIAM LAFFERTY.

An early settlement, accompanied with a subsequent warrant and survey, is preferable to a prior warrant and survey.

Evidence of improvements antecedent to the time of interest commencing, as stated in the warrant, shall not be received.

Ejectment for one messuage and 380 acres in Fayette township.

The plaintiff claimed under a settlement right originally.

It appeared that in 1774, the lessor of the plaintiff came upon the land, which was then unappropriated, and did work there. The next year he raised corn on five or six acres which he had cleared, and brought up his mother and sisters in the fall, and they lived together in a cabin on the land, very near the lands in question. He constantly resided on the land since that time, except when the inhabitants were driven off by the Indians. There was a consentable line established between this place and a tract whereon William M'Manimy lived—whose house was about half a mile from the acknowledged boundary.

Nicholls, on the 22d March 1798, took out a warrant for 380 acres, including his improvement, adjoining lands of the widow Johnston, &c., interest to commence from the 1st March 1774, and obtained a survey thereon of 380 acres and 48 perches, on the 6th September 1799, whereof 108 acres were claimed by William Harvey, which included the lands in dispute, but no one had lived thereon until 1785.

The defendant claimed under a warrant granted to William Harvey, dated 27th July 1785, including an improvement made by William M'Murray, adjoining, &c., interest to commence from first March 1780, and a survey thereon of 108 acres, made on the 30th June 1786.

It was proposed by the defendant's counsel to examine witnesses as to the improvements made by M'Murray antecedent to the first March 1780, on the lands in question.

Sed per cur. This point has been so often decided, and even in some cases apparently hard, that we cannot permit it at this time to be debated. The warrant holder has precluded himself from deriving his equitable title of improvement beyond the day called for in his warrant. The decision will conduce to good morals, and serve as an additional proof of the old adage, that honesty is the best policy, and we will not deviate from it.

But has not enough been shown, to evince that the plaintiff has the earliest and best possessory right, and must necessarily recover? He claims under a *bona fide* settlement eleven years earlier than the defendant's warrant, uniformly pursued and continued, which must embrace the 108 acres in dispute. And to this he unites a title by warrant and survey, paying interest to the commonwealth from his first improvement.

The jury gave a verdict for the plaintiff *instanter*.

Messrs. Ross and Woods, *pro quer*.

Mr. Sample, *pro def*.

Lessee of JOHN WILKINS, jr. *against* JOHN ALLENTON.

The state only can take advantage of defaults of actual settlement, under the law of 3d April 1792.

Proofs of actual settlement must be subsequent to that law.

EJECTMENT for one messuage and 400 acres of land, on French creek.

The plaintiff claimed under a warrant to John Wilkins, jr. for 400 acres of land, north and west of the rivers Ohio and Allegheny, on French creek, adjoining a survey made for Baum, and including the claim formerly of John Wentworth, agreeably to the acts of assembly of 3d April 1792, and of the 9th March 1796, dated 18th March 1796, reciting that he was desirous to settle and improve the said 400 acres. A survey of 373 acres and 102 perches, was made by John Power, on the 20th September 1797, it being the same tract which was surveyed to John Wentworth, on the 27th March 1794, on his improvement, dated 3d April 1792. A patent issued thereon, dated 17th July 1801, to Wilkins, which was admitted by the defendant's counsel to be read, though the demise was laid on the 1st February 1799, and the ejectment brought to June term 1800.

The defendant's counsel moved for a nonsuit. The terms of actual settlement prescribed by the 9th section of the act of 3d April 1792, are not shown by the plaintiff to have been complied with. 3 St. Laws 212. The patent since the ejectment brought, cannot dispense with the conditions originally imposed, nor have any effect. It was founded on mistake and misapprehension of the law, and is therefore void. 2 Bl. Com. 348. It was decided by the justices of this court here in October 1800, between Meade's lessee and Haymaker et al. that the conditions of actual settlement and residence are equally obligatory under the warrants obtained by

Meade, as under others. Though the plaintiff claims under a credit given to David Meade, by the act of 9th March 1796, 4 St. Laws 16; yet that law only removed the impediment as to his warrants, created by the acts of 22d April (3 St. Laws 581) and 22d September, (3 St. Laws 636) and operated as a virtual repeal of those acts, as to the necessity of previous improvements to such warrants. On the 14th March 1796, the Board of property estimated the lands of Meade at 1392 $\frac{1}{2}$., and by the act of the 9th of the same month, he obtained a credit for the same in the books of the receiver general, which might be transferred to any person, and passed as credit, either in taking out new warrants in any part of the state, where vacant land might be found, or paying arrearages of former grants. The law passed the house of representatives, obliging him to pay 30 $\frac{1}{2}$. per hundred acres, according to the provisions of the 6th section of the act of 21st December 1784, for such new warrants as he should obtain, but it received considerable amendments in the senate on the 27th February and 5th March 1796, and was finally modified and enacted, as we find it in our statute book. It will not be pretended, that if he had received his money, he could have further claims against the state; and the legislature could not mean, that the sum passed to his credit, should be more valuable than the same sum in cash, in the hands of other persons; or that Meade and those claiming under him, should experience the benefit of the diminution of price in the lands, and not be subjected to the terms of actual settlement, equally with other citizens. The rate of lands across the rivers Ohio and Allegheny was lessened, to enable the holders of them to make efficient settlements; and this was the great object contemplated in the law of 3d April 1792. It was calculated as a complete system of settlement, which would of itself be carried into execution. The words of the 9th section are, "in defect of such actual settlement and residence, it shall and may be lawful to and for this commonwealth to issue new warrants to other actual settlers for the said lands," &c.; and of the 10th section, that on the actual settler making default, the commonwealth may grant the same lands or any part thereof to others by warrants. The variation of phraseology as to the two other classes of landholders, was certainly intentional. Other actual settlers mean persons really on the lands, and the expressions can convey no other idea. The entry of such settlers therefore on such lands, whereon default has been made, is congeable. The will of the community is supreme, and has so directed it. Warrant holders cannot pretend that they have more equity than actual settlers. If the latter abandon their settlements, their farms are open to new

applications. Why should it not be so also in the cases of the former? A base or qualified fee must be determined, whenever the qualification annexed to it is at an end. 2 Bl. Com. 109. There is a distinction between a condition in a deed and a limitation. When the estate is so expressly confined by the words of its creation, that it cannot endure for any longer time than till the contingency happens, upon which the estate is to fail, this is a limitation; and the estate may be defeated thereby without any entry or claim to avoid it. *Ib.* 155. The estate here is at the utmost a chattel interest, which terminated on the default of the warrantee. *Ib.* 156. The warrant is dated in March 1796, and no settlement has been shown under it before the ejectment was brought to June term 1800, more than four years, though it should have been made in two years. On a condition precedent, the party has no estate until the condition be performed, even if the condition has become impossible. *Ib.* 157. 2 Dall. 317. Co. Lit. 206, b. On a limitation, the estate determines *ipso facto*, without entry. Co. Lit. 214, b.

Moreover, the argument *ab inconvenienti* applies forcibly in the present instance. Unless actual settlers are encouraged to seat themselves on the lands of defaulting warrantees, the intentions of the legislature as to forming settlements by way of the frontiers will be defeated.

The plaintiff's counsel observed, that they had it in their power to prove a settlement under the law, but deemed it to be unnecessary. The plaintiff was entitled to a transferred credit under David Meade. It was resolved in this ejectment against Haymaker et al. that he might take out a warrant without any previous improvement, a term binding on other citizens. Was he not then confessedly in a better plight than others with their cash in hand? The act of 28th March 1787, (Loose Laws 207) grants an equivalent to the Pennsylvania claimants, for their claims either in the old or new purchase, at their option; and warrants and patents, and all other acts of the public offices were to be performed free of expense. In these particulars also, they were put in a better situation than others applying for lands. We know nothing of the original bill in the lower house, or of the amendments thereto in the senate, which have been mentioned, and which afterwards were enacted into a law on the 9th March 1706. The court have not the journals of either house before them, whereon they can judge; but this we do know in the language of the same act, that the Pennsylvania claimants "had performed on their part all the requisites necessary

to their obtaining the benefits of the said laws; and it was just that the persons complying with the terms of the law, while it was in existence, should be entitled to the benefits of the same." The legislature had made a solemn engagement with the persons who had thus surrendered their pretensions for the public peace; and the community were bound by their acts, as moral agents. We likewise find, that grants were made to the Washington and Pittsburg academies, exempted from settlement. Why should not Meade, and those claiming under him, have the same indulgence?

The sentiments of the court on the subject of settlement on Mead's rights were delivered *obiter*, in the case of Haymaker. The point was not argued, nor was the question directly before the court, and is therefore open to discussion. If the two laws of 1794, had not passed, Meade might have obtained vacant lands any where within the state. What we insist on is, that the law of 9th March 1793, was meant as an honest fulfillment of the public plighted faith by the act of the 28th March 1787, unfettered by terms of settlement or any other conditions whatever, unknown at that time.

But it has been said moreover, that the warrantee never had more than a chattel interest, and right of interest in these lands, though he has paid the full consideration to the state. And it is assumed as a ground of argument, that the estate, such as it was, determined *ipso facto* by its limitation. This is denied, not only on the express words of the law, which prescribes a certain mode of issuing new warrants vacating the original warrants, but on the authority of the decision of this court in *Morris's lessee v. Neighman and Shriner*, in May 1799. The warrantee, by payment of his money, and receiving possession of the land, obtains an estate on certain conditions; and to take advantage of a condition broken, there must be an actual entry. *Co. Lit.* 218, a. 2 *Bl. Com.* 155. A stranger cannot enter, but only the grantor or his heirs. *Co. Lit.* 214, a.

It has also been objected, that there is a difference of expression in the 9th and 10th sections of the act of 3d April 1792, as to vacating the interests of warrantees and actual settlers. It will be clearly found, that the former section equally respects both, where defaults have been made as to settlements; and that the latter section is merely confined to the instances, of actual settlers not taking out their warrants within ten years after passing of the act. Admit an entire equality of equity between the two classes of landlords, though the warrantees have paid their money into the coffers of the state, why in the reason and nature of things, should entries on the land without authority be allowed in the case of the warrantees,

and not as to the settlers? The advocates of the pretensions of the latter, will not contend, that in default of the full complete settlement and residence pointed out by the law, one actual settler may dispossess another of his farm, on the pretence of the interest of the latter being determined by its limitation, and that the entry of the latter is congeable. Such a doctrine would produce infinite disorder and confusion. If inconveniences are to be regarded in the exposition of the law, it will certainly be necessary to adopt the rule, that some public authority should determine between the contending parties; that they should not be permitted to judge and decide on their individual claims, and carve out their several remedies at their will and pleasure. No one can doubt that the peace and welfare of the community are intimately interested herein.

By the court. We expressed our opinions incidentally in *Meade's lessee v. Haymaker et al.* that actual settlements were requisite in the case of warrants issued under the act of 9th March 1796. The present question was not immediately before the court, but the case naturally led to it. We mean not however, now to give any decided opinion on that point, as we are not possessed of the minutes of the house of representatives or of the senate, which have been referred to in the argument.

Admitting that the conditions of actual settlement are obligatory on the warrants issued, under that act, to David Meade and others claiming a credit under him, it is contended, that by the words of the 9th section of the act of 3d April 1792, in default of settlement and residence the commonwealth may issue new warrants to other actual settlers for the said lands, &c. and that these expressions imply a right to settle on such lands whereon default has been made, previous to such new warrants being issued. But will not the intention of the legislature be better fulfilled, and all the words of the clause receive their full operation, by construing actual settlers to mean other persons, who are desirous to settle and improve the lands? If they must of necessity be construed to mean persons, then cultivating the land, then none but such characters would be entitled to vacating warrants, in exclusion of the rest of mankind, however desirous and ready to make settlements. Besides if we regard the grammatical construction, and adopt the sense insisted on by the defendant's counsel, then those words must be taken as referring to such actual residence and settlement, mentioned two lines before, comprehending fencing, clearing, cultivating, &c. erecting the messuage, &c., and residing thereon five years. Neither of these constructions, it is presumed, will be contended for

The first opposes every ground of that just equality, which ought to prevail amongst the citizens of a free government; the last is *felo de se* of the object endeavoured to be accomplished, and is moreover repugnant to the subsequent words, and so as often as defaults shall be made, for the time and in the manner aforesaid, &c., which presupposes defaults on new grants. The farmers of the law wisely extended, in order to guard against confusion, disorders and uncertainty, that the constituted public authorities of the state by the medium of the land office, should determine respecting the defaults alleged to have been committed by the first warrantees. The opinion delivered by the court in *Morris's lessee v. Neighman and Shriner* was consonant thereto, and was delivered in direct terms, that no individuals could take advantage of the breach of the condition, unless through the instrumentality of the commonwealth's officers, by granting new warrants in a specified form. This was likewise recognized by the majority of the judges, in the late contested case of the mandamus, between the Holland Land Company and Tench Cox, the secretary of the land office. We see no reason at present, to recede from the opinion which we have deliberately formed, but are still open to conviction. We feel and know, that this point requires to be finally settled, and that the peace and safety of the country are involved in an early and mature decision. We therefor invite the defendant's counsel to take a bill of exceptions, move for a new trial, or to consider the question as a point reserved for further discussion. In the mean while, the motion for a nonsuit is denied.

The defendant's counsel then offered to show in evidence, that William Gregg and John Gregg, two brothers, seated themselves down on French Creek, in this quarter of the country in the year 1789. They continued there that summer, and each designated for himself a tract of land, supposed to contain 400 acres; William's claim was up French Creek, and John's below it. A small cabin was built on William's tract wherein they resided. They then returned into the inhabited parts of the country and came back in the spring of 1790, built a large house on John's tract, and raised 100 bushels of corn and 500 bushels of potatoes on the lands that summer; John Gregg returned to Susquehannah that fall, but his brother William continued to reside in the larger cabin that fall and the ensuing winter, and was killed by the Indians, on the lands, in the spring of 1791. The defendant afterwards intermarried with the widow of William Gregg, and holds the lands in controversy,

in her right, and under William M. Adams, the guardian of his minor children.

This evidence was opposed by the plaintiff's counsel, on the ground of its not proving a settlement recognized by the law. By section 6, of the law of 12 March 1784, no improvement, office right or claim, under any Indian nation, or the late proprietaries, within the lands appropriated for the redemption of the depreciation certificates, or donations to the officers and soldiers in the continental army, shall be valid, but the same shall be null and void to all intents and purposes whatsoever. 2 Dall. sta. Laws 90. By the 2d section of the act of 1st April 1784, the land office, which was shut in 1776, was first opened from the 1st July 1784, for obtaining new rights to lands already purchased from the Indians; and the 8th section excepts the depreciation and donation lands. Ib. 201. The same exception is again made by the act of 21st December 1784, § 6, Ib. 234. The law of 3d April 1792, first gave a right of settlement to these lands. The words of the 2d section are, the lands north and west of the rivers Ohio and Alleghany and Conenwango creek, and are hereby offered for sale to persons who will cultivate, improve and settle the same. And the 5th section which directs, that the deputy surveyor shall not survey the lands on warrants, that may have been actually settled and improved prior to the date of the entry of such warrant with the deputy surveyor of the district, except for the owner of such settlement and improvement, can only mean lands settled and improved after passing of the law.

By the court. The present case interests our feelings, but we must endeavor to find out the true meaning of the law, and adhere to it firmly. The grammatical construction of the act is clear, and puts all the people of the country on an equal footing. The words of the act are in the future sense; and the preamble offering encouragement to actual settlers, must naturally refer to those who shall settle, and not to those who had theretofore settled. We are bound by the expressions, and our uniform decisions have been, that proofs of settlement under this law should be confined to settlements made after it was passed. But if the defendant's counsel are dissatisfied with this opinion, we again invite them to put it in a train, to go before another tribunal.

It was then agreed, that a verdict should pass for the plaintiff, on the pronouncing whereof, general Wilkins generously agreed

to convey one moiety of the lands in question to the minor children of the aforesaid William Gregg.

Messrs. Ross, Woods and Sample, *pro quer.*

Messrs. Collins, Foster, Baldwin and Ayres, *pro def.*

ALEXANDER WRIGHT *against* BRICE M'GEHAN

An indescriptive warrant, will not effect an improvement made before the same was entered and surveyed; but it must be a personal resident improvement.

COVENANT. Plea covenants performed.

The action was brought on an article of agreement, dated 8th March 1796, whereby the plaintiff had sold all his right and claim to an improvement of 400 acres, north and west of the river Ohio, adjoining, &c. in consideration of 125 dollars, payable on the 1st May 1796, and the like sum in one year thereafter. But if the population land company should hold these lands by their warrants, then the consideration money to be returned to the defendant, without interest.

The defendant had paid no part of the consideration money. To show that the money was not recoverable, he produced a warrant, dated 14th April 1792, to Michael Shubert for 400 acres and a survey made thereon on the 13th March 1795, by John Power deputy surveyor. The leading warrant had issued in the name of Matthew M'Connel, for 400 acres, extending along Big Beaver creek, near the falls thereof, and was entered in the books of James Caruthers, then deputy surveyor of the district, on the 10th June 1793; Shubert's warrant was entered on the same day, and ninety one warrants intervened between them.

The plaintiff about the time of the survey made for Shubert, (or one or two days before it, as it probably appeared from circumstances, though the particular day was not shown by direct testimony,) erected a cabin about fourteen feet square, on the land, covered it in, but without chimney or door in it, and sold his improvement to the defendant; but no one had then lived on the land, or cultivated any part of it.

Mr. Collins for the defendant, insisted, that the plaintiff had no title to the lands sold, under his fancied improvement; and that want of title without eviction, was a good defence in an action for the price of the land sold. Addis. 128.

Messrs. Ross and Woods for the plaintiff, urged, that under the law of 3d April 1792, (3 Dall. St. Laws, 210,) it was enacted, that applications should contain a particular description of the lands applied for § 3.—And it is provided by the act of 22d

April 1794, (*Ib.* 581,) that no warrants, except those wherein the land is particularly described, shall in any manner effect the title of the claim of any person, having made an actual improvement, before such warrant is entered and surveyed in the deputy surveyor's books, § 2.—And the act of 22d September 1794, (*Ib.* 637,) has the same proviso, in favour of improvers. § 2. Here it may fairly be inferred, that the house was built before the survey was made for the population company, which was the inception of an actual improvement under the law of April 1794. It could not be contended, that Shubert's warrant was descriptive of any particular ground. It depended on the location of ninety two other warrants, and necessarily must shift its situation, according to the surveys made on the prior warrants. If such warrants must be postponed to improvements, then the title of the plaintiff was preferable to that of the population company. But if the house erected, should be thought not to merit the appellation of an improvement, still the plaintiff is entitled to recover the value of the house. The defendant after contracting for the land, received the possession, and then purchased of the population company.

By the court. The meaning of the agreement appears clearly on the face of it. If the title of the population company was better than the plaintiff's, the latter was bound to return the consideration, if he had received it. But if the plaintiff had no title, the defendant was not bound to pay. The warrant being indescriptive, would give way to a *bona fide* settlement and improvement, if made previous to the survey, under the proviso in the act of 22d April 1794, but not to a land-jobbing cabin, made without an intention of residence. The improvement meant in this law, can be no other than that described in the act of 30th December 1786, (2 St. Laws, 488,) and this fully appears by the act of 22d September 1794. On this point, the court expressed the grounds of their opinion fully, in *Meade's lessee v. Haymaker*.

But it is said, the plaintiff should be allowed for his cabin. Why so? No such provision was made in the article, if the title of the population company was preferable. The effect of a recovery by that company against the defendant, would be that the judgment would be conclusive evidence against the now plaintiff. At present the point of title is open for investigation by the present jury; and the court are clearly of opinion, that the want of title in the plaintiff is a good defence in the present suit, though there has been no eviction.

Verdict for the defendant.

AT A CIRCUIT COURT, AT GREENSBURGH, NOVEMBER 1801.

CORAM, YEATES AND SMITH, JUSTICES.

RESPUBLICA *against* CHRISTOPHER REIKER.

Indictment on the first clause of the 6th section of the act of 22d April 1794, against maiming, leaving out the words "lying in wait," or on the second clause, leaving out the word "voluntary," is defective.

MAJHEM. The indictment stated, that Christopher Reiker, late of, &c. on the——day of——&c. contriving and intending one David Hill to maim and disfigure, at——township, in Westmoreland county aforesaid, with force and arms, &c. in and upon the said D. H. in the peace of God and of this commonwealth, then and there being, on purpose and of his malice aforethought, unlawfully and feloniously did make an assault, and the said C. R. with both his hands, the right eye of him the said D. H. on purpose, and of his malice aforethought, then and there, unlawfully and feloniously did gouge and put out, with an intention him the said D. H. in so doing, in manner aforesaid, to maim and disfigure: to the great damage of the said D. H. and against the peace, &c.

The court having heard four witnesses on the part of the prosecution, observed, that this indictment was framed on the coventry act of 22 and 23 Car. 2, c. 1, except that very material words, lying in wait, (Cro. Arc. Comp. 268,) were omitted herein, which the evidence here would not warrant. Our act of assembly for the better preventing of crimes, passed 22d April 1794, (3 Dall. St. Laws, 601,) § 6, has defined the offences of maiming, in two independent clauses; the first pursues the words of the British statute, with the insertion of the words "on purpose;" the second, "whosoever shall voluntarily, maliciously, and of purpose, pull or put out an eye, while fighting or otherwise," was made with the express design of putting a stop to this diabolical and savage practice. The indictment here has dropped the word "voluntarily," and being defective on both clauses of the act, the judgment would necessarily be arrested, even if a conviction took place. The defendant must therefore be acquitted of this indictment, but must enter into recognizance with two sureties, to answer a proper charge at the next court.

of Oyer and Terminer, and to keep the peace, and be of good behavior in the mean time.

Verdict *non cul.*

Messrs. Galbreath, Woods and Collins, *pro repub.*

Messrs. Ross and Young, *pro def.*

Lessee of EPHRAIM WALLACE *against* THOMAS DIOKEY.

An improvement right, without a previous possession within 7 years before bringing the ejectment, though accompanied by a warrant without survey and a decision of the board of property, nothing being done thereupon after, is barred by the act of limitations of 26th March 1795.

EJECTMENT for one messuage and 100 acres of land in Salem township.

The lessor of the plaintiff settled on the lands in question in 1775, cleared 12 acres and had 26 acres under fence. He continued living in his cabin with his family cultivating the land, until he was driven off by the Indians, with the other inhabitants, in the fall of 1777. He returned in the following year and threshed out his grain. On the 23d February 1785 he took out a warrant for 300 acres, including his improvement adjoining lands of William Dickey, &c. Interest to commence from 1st March 1773. But it did not appear, that he had ever applied for a survey to be made on his warrant, nor was any survey made thereon.

Joseph Irwin on the 8th November 1784, obtained a warrant for 400 acres including an improvement on the waters of Beaver Dam Run, adjoining lands of David Dickey, &c. Interest to commence from 1st March 1774. A survey of 399 acres, 141 perches was made on this warrant by John Moore, deputy surveyor, on the 18th April 1786, with a note subjoined thereto, that Ephraim Wallace claimed the land under an improvement. Previous thereto, on the 9th April 1785, Irwin conveyed his right to George Henry in consideration of 250l. On a caveat filed against the survey made under Irwin's warrant, the board of property decided on the 5th March 1792, that 200 acres of the survey should be returned on the warrant of Wallace, and the residue for Henry under the warrant of Irwin. No return was made for Wallace, nor any application by him made for that purpose. In 1794, Wallace put one Robert White as a tenant on part of the land, and who continued thereon since, but there had been an adverse possession against him by the present defendant, before this ejectment was brought, for 10 years.

Two days before the present jury was sworn, an ejectment

came on for trial between lessee of George Henry and the said Robert White. No evidence of any improvement or settlement was shown previous to the date of Irwin's warrant, and the evidence of a settlement by Wallace as above stated being given, the court were of opinion, that although he had the later warrant, yet his *bona fide* settlement entitled his tenant to a verdict; and the plaintiff in that cause suffered a nonsuit.

The court were clearly of opinion, that the now plaintiff was barred by the act of limitations of the 26th March 1785, (2 Dall. St. Laws 282.) Here was no quiet and peaceable possession under his prior settlement within seven years next before bringing this action; no survey was had under his warrant, nor any return under the decision of the Board of Property. A case somewhat similar occurred at Dauphin in Sturgion's lessee v. Waugh at Nisi Prius in October 1799, wherein the court expressed the same opinion.
Plaintiff nonsuit.

Messrs. Sample and Armstrong, *pro quer.*

Messrs. Young and A. Morrison, *pro def.*

Lessee of ANDREW BLAIR *against* JOHN CALDWELL.

Want of proof that the names of the commissioners of the county had been returned to the sessions, will not invalidate a sale for a non payment of taxes; but there must be due proof of assessment and advertisement.

EJECTMENT for one messuage and 227 acres in Derry township. The plaintiff claimed under a warrant dated 1 December 1788, and a survey thereon made 15th April 1789.

The defendant held under a deed made by John Kirkpatrick, Barlet Laffer and Jacob Smith, commissioners of the county, dated 21st September 1796, reciting that the lands in question were unseated by Andrew Blair and had been assessed for the state tax of 1789 at 8d., and for the county taxes of 1789 and 1790 at 4s. 5d., and that the same had been sold on the 12th August 1796 to the defendant, and John M'Mullen for 67 dollars.

The plaintiff's counsel moved, that it should be shown, that the names of the county commissioners were returned to the sessions, and entered by the clerk, and that they had taken the oath of office. The want of this proof had invalidated a sale for taxes, in Miller's lessee v. Moore and Cochran, at Nisi Prius in Carlisle, May assizes 1783. See act 20th March 1724-5.

Sed per cur. That resolution has been generally disapproved of. The objection would go too far, and affect a variety of cases. Every thing shall be presumed in favor of the acts of officers *de facto*. But all our decisions unite in requiring proof of the regular assessment of the taxes, and of the due advertisement of the lands previous to the sale. This was first established on full argument in bank, before all the judges of the Supreme Court in September term 1796, in the leasee of Sarah Wistar v. John Kammerer, on a motion for a new trial; and the doctrine has been uniformly pursued since.

It was then admitted, that regular advertisements could not be shown in the present case, and agreed, that a verdict should pass for the plaintiff.

Messrs. Young and Kennedy, *pro quer.*

Messrs. Woods and Armstrong, *pro def.*

AT A CIRCUIT COURT, AT BEDFORD, NOVEMBER 1801.

CORAM, YEATES AND SMITH, JUSTICES.

LESSEE of JOHN STRINNETZ and WILLIAM BELL *against* GEORGE NIXON.

Err. in ejectment by tenants in common, *quod demiserunt*, is ill. Where one tract of land is attached under a foreign attachment and so entered, the court cannot even by rule, substitute a different tract of land.

THE plaintiff declared, on demise made 2d November 1797, by joint tenants of one messuage, one garden, one orchard, 10 acres of meadow, 200 acres of arable land, and 604½ acres of woodland on Yellow creek, in Hopewell township. The title was as follows:

On the 29th October 1762, George Nixon, the defendant applied for 400 acres, including two springs, at the foot of the Cove mountain, on the north west side of John Piper's land, and known by the Large Hill of Black Oaks. On the 5th June 1765, a survey was made by Richard Tea of 814½ acres, but stated to be on a warrant dated 8th September 1762. Previous hereto, Nixon on 2d March 1764, conveys his right of an order of survey dated 8th September 1762, to George Woods, in consideration of 10£., who on the 19th March 1764, conveys his right to Richard Tea and John Little, in consideration of 76£., and on 14th December 1764, Tea conveys his undivided moiety to Francis Wade and Samuel Johnston, in consid-

eration of 110%. On the 31st July 1778, Johnston conveys his one fourth part to Joseph Donaldson and Alexander Donaldson. On the 26th December 1777, Johnston and Wade conveyed their joint interest to the said Joseph and Alexander Donaldson. On the 11th November 1778, John Little conveyed his moiety of the lands to the said Joseph and Alexander.

A foreign attachment in case was instituted by the lessors of the plaintiff to August term 1792, in Bedford county, against the said Joseph Donaldson; whereupon the sheriff made return, attached three tracts of land; one of 400 acres adjoining George Nixon and George Elder, one other of 150 acres on the east side of Juniata, and one other tract in the name of George Elder, adjoining Hugh Barclay. In April term 1793, the court made a rule that the sheriff should amend his return, as to the quantity of acres of each tract attached by him. Whereupon amendments were made accordingly, but instead of the second tract of 150 acres attached, 81 $\frac{1}{2}$ acres were inserted, described as in the survey. Judgment was entered in the attachment in November term 1793.

On the 27th August 1794, Jacob Bonnet, esq., then sheriff, conveys one moiety of the three tracts attached, to John Cadwallader, esq., who on the 29th of the same month, conveys to the lessors of the plaintiffs as joint-tenants, and on the 16th June 1795, Alexander Donaldson conveys to them the remaining moiety, as tenants in common.

The defendants counsel insisted, that exclusive of the objection which presented itself from the warrant of the 8th September 1762, on which the survey was made, not being shown in evidence, it was obvious, that the moiety of the lands conveyed by Alexander Donaldson could not be recovered in this action. His deed to the lessors of the plaintiff was as tenants in common, but they had declared as joint-tenants, which was certainly ill. 1 Brownl. 13. Cro. Jac. 166. Law of Ejectments 74. 2 Wils. 232. 1 Show. 342. Comb. 2 Bull. 105.

Neither can the plaintiff recover the other moiety conveyed under the attachment. This species of process is *in rem*, and the land or articles attached can only be acted upon, unless the attachment is dissolved by the entry of special bail. The Court of Common Pleas could not, if they were even so disposed, make a rule, directing the sheriff to substitute one tract in the room of another, which has been attached, for the latter alone is affected by the process. But here there was no such intention, the rule is merely to amend the quantity of acres in each tract, and the attempt to subjec

a different tract to the operation of the attachment, is perfectly unjustifiable and without any solid grounds. The substratum failing the fabrick erected on it must clearly fall.

The court were clearly of this opinion, on both points, and the plaintiff suffered a nonsuit.

Messrs. Watts and Cadwallader, *pro quer.*

Messrs. Hamilton and Duncan, *pro def.*

Lessee of BENJAMIN ELLIOT *against* JACOB BONNET.

An early continued personal resident settlement is preferable to a later patent.
Recital in a warrant of acceptance will bind proprietaries and those claiming under them by subsequent rights; aliter, of those under elder rights.
Practice of the surveyor before the revolution, as to 10 per cent surplus.

EJECTMENT for lands in Providence township, brought to November term 1793.

The facts on each side turned out in evidence as follows:

The plaintiff claimed under an ancient settlement and improvement, made near the head of the Snake Spring, begun in 1754 by Thomas Croyle, and continued by him and those who held under him, whenever the state of the country would admit of it, until December 1788. Valuable improvements were made on the land as well by buildings as otherwise.

In June 1762, Croyle sent his son with money to the secretary of the land office, with directions to procure a warrant for 300 acres of land, including his improvements. He made three applications to the office for that purpose, but met with refusals, and was permitted to take out a warrant for 100 acres only, dated 10th June 1762, adjoining lands surveyed to George Croghan, and including his improvement at the mouth of Snake Spring. On this warrant a survey of 123 acres and 123 perches was made so late as 4th March 1768, by George Woods, for Richard Tea, deputy surveyor of the district.

On the 26th May 1763, a warrant of acceptance issued in favor of George Croghan, reciting that "by our consent and direction, there was surveyed in 1755 by John Armstrong, D. S. a tract of land on Snake Spring, containing 390 acres and 111 perches, for which he agreed to pay 15l. 10s. per hundred acres, and interest from 1st March 1755," and requiring the surveyor general to accept the survey and return it into the secretary's office. The survey offered was dated 1755, with the signature of John Armstrong, E. S. (containing as above and calling for Thomas Croyle on one of the lines,) but without specifying any authority under which it was made.

This survey was opposed by the plaintiff's counsel, but it was allowed to be read by Yeates, J., being called for in the warrant of acceptance, who said he would express his sentiments thereon full to the jury.

(Smith, J. took no part in the cause, having been formerly concerned in it as counsel.)

On the 20th May 1763, a patent issued to George Croghan in consideration of 60l. 2s. 2d., who on the 1st December following conveyed the same to Richard Tea, and it afterwards by several mesne conveyances became vested in the defendant.

On the 3d August 1767, Thomas Croyle obtained an application for 200 acres, adjoining his warranted land in Croyle's Valley, on the east side of the Ray's Town branch of Juniata, on which there was surveyed 158 acres by George Woods, on 12th March 1768.

On 14th April 1774, Croyle executed a deed to Robert Elliot in consideration of 330l. for three tracts of land, the first including the mouth of Snake Spring, in pursuance of his warrant for 100 acres; the second adjoining thereto, in pursuance of his application; and the third held by improvement, including the fountain of Snake Spring, with a covenant therein, that he would prove his right of improvement to be antecedent to the right or claim of any other person. And on the 30th March 1780, Robert Elliot conveyed the same lands to the lessor of the plaintiff, with covenant of general warranty as to the improvement right. In December 1788, the tenant of the lessor of the plaintiff was dispossessed of the lands claimed by improvement, under a judgment, without a hearing on the merits.

After the cause had been fully argued by Messrs. Duncan and Riddle for the plaintiff, and by Messrs. Hamilton and Watts for the defendant, Yeates, J. told the jury, that the case resolved itself into two questions. 1st, Whether the settlement title being the earliest, was not preferable to the patent? 2d, Whether the improvement right had been abandoned?

The jury were the exclusive judges of the credit of witnesses, but they ought not on slight grounds to discredit disinterested testimony, and particularly when fortified by circumstances usually attendant on such cases. If the witnesses were believed, they showed an actual personal resident settlement by Croyle at the head of the Spring, though he had a shed and some cleared land at the mouth. He had cleared several acres towards the mountain and downwards towards the Juniata, and must in the nature of things, have intended to include the whole in his act-

ment right. His continuance on the land, when there was not impending danger, his early returns after the dangers had ceased, evinces his unequivocal intentions. The survey of 1755 calls for his lands as a boundary, and corroborates the testimony of the witnesses. But for any thing that appears, this survey was an inofficial act, made without authority. The recital of it in the warrant of acceptance, as made by the consent and direction of the proprietaries, cannot legitimate it, as against Croyle and those claiming under him. The recital is evidence against the late proprietaries, and those claiming under them by subsequent conveyances, but not against those holding under an earlier right. *Gilb. Law Evid.* 99; 100. *6 Mod.* 44. *1 Salk.* 286. *Hardr.* 120. *3 Lev.* 108. *12 Vin.* 233. Croyle applies in 1762, with his money, for a warrant for 300 acres to include his improvement, according to the uniform usage of the office, but is refused, and he can only obtain a warrant for 100 acres to include his improvement at the mouth of Snake Spring. He could do no more; and it would seem on the whole, that the patent, unless there has been an abandonment of the improvement right, must give way to it.

The abandonment must be judged of by the jury as a matter of fact, under all the circumstances. When Croyle applied for his warrant for 300 acres by his son, he did not mean to abandon. He was dissatisfied with what his son had done, and said he would apply to Mr. Penn for justice. He clings to his improvements, and will not surrender the possession of them. When he sells to Robert Elliot, he pledges himself to prove his prior right. If the present defendant, or any persons under whom he claims, had made valuable improvements since the former recovery by default, and before the present ejectment was commenced, it would avail him much, as proof of abandonment; but no such evidence has been given.

If the jury shall decide for the plaintiff on both points, the only remaining thing to be considered is, what ought he to recover? He has got under the warrant to Croyle including his improvement, 123 acres and 123 perches, and there being another legal right in the hands of the surveyor (though posterior to Croyle's application) before the survey was made, he is now entitled only to 176 acres and 37 perches, the difference between what is already surveyed to him, and the strict quantity of 300 acres under his improvement, and not to any surplus quantity of 10 per cent.

The jury came into court in a short time, and found a verdict for the plaintiff for 200 acres, and allowance of 6 per cent for roads, &c., but were told, they must specify whatever they did find, how the same

should be laid off, and that possibly their finding the surplus of 10 per cent would endanger their verdict.

The jury next morning appeared at the barr, and delivered in their verdict for 176 acres and 37 perches for the plaintiff, finding where the same should be surveyed.

The practice before the revolution was as follows: A person at that time, who had a warrant or order for 300 acres of land, was by the practice of the office, and instructions* of the surveyor, entitled to 10 per cent, beyond the usual allowance of 6 per cent for roads, besides the quantity mentioned in his warrant or order, and might demand of the deputy surveyor to survey on his warrant or order of 300 acres, 330 acres and allowance for roads, provided there was no opposing claim of a third person before the survey was made. But if there was any such opposing title before the survey was actually made, the surveyor was confined to the precise number of acres mentioned in the warrant or order.

From the information of Mr. Justice Smith.

Lessee of BERNARD DOUGHERTY *against* JOHN PIPER, esquire.

A warrant improvidently issued, without any money paid, directed by the surveyor general to a deputy to be executed, and a survey thereon, permitted to be read in evidence.

Minutes of the Board of Property are uniformly read, to show what passed before them. In many cases, acts done since the ejectment brought may be given in evidence.

EJECTMENT for 108 acres and 152 perches, in Coleraine township.

The plaintiff claimed under a slight improvement of some adjacent land, made by James Wells, who sold to Edward Logston, on the 16th January 1765. Logston conveyed to the lessor of the plaintiff on the 26th of the same month.

He offered in evidence the copy of an original warrant in his own name, dated 17th April 1766, for 250 acres, including his improvement, which he purchased of Edward Logston, who purchased of James Wells, lying on a branch of Juniata, called Piper's Run, known by the name of the Flag Bottom, about 14 miles from Bedford; interest to commence from 1st March 1762. On this warrant was indorsed a direction, under the signature of John Lukens, then surveyor general, to Richard Tea, deputy surveyor to execute the warrant; also in the hand-writing of the said Richard Tea, "Executed November 11, 1766, 293½ acres, returned by R. Tea."

* These instructions were founded on an order of the Board of Property, dated 1st May 1767.

The plaintiff likewise offered the draft of survey made by the said Tea, on the 11th November 1766, containing 293 $\frac{1}{4}$ acres. To the reading of these papers to the jury the defendant's counsel excepted, and produced a certificate from Samuel Cochran, surveyor general, that no such original warrant, nor any traces thereof could be found in his office; a second certificate from Francis Johnston, receiver general, that no money appeared in his office to have been paid thereon; and a third certificate from David Kennedy, secretary of the land office, that the original warrant then remained in his office. It likewise appeared by the testimony of Mr. Justice Smith, that during the period in which William Peters acted as secretary of the land office, some complaints existed as to issuing warrants, where they had not been paid for, but that all those irregularities were cured when James Tilghman, esq. came into that office.

Per cur. Let the warrant and survey be received in evidence; their operation will be judged of afterwards. It will be remembered, that the warrantee has not conveyed his right to any other person; and the warrant has issued from the office improvide?

The defendant then showed in evidence a warrant for 200 acres, including the forks of a large run, which empties itself into Juniata, dated 5th June 1762; a receipt for 10*l.* paid thereon, and a survey of 334 acres, made on the 11th June 1767, by George Woods, including the Flag Meadow, comprehended in the plaintiff's survey, and a house of hewed logs, two stories high, 26 feet by 24, which had been built by Dougherty.

He then offered a copy of the minutes of the Board of Property of the 27th December 1768, whereby it appeared to be agreed, that the defendant's survey should be returned; that the house built by the lessor of the plaintiff should be valued by William Proctor and James M'Call, and that the former should pay to the latter the value set by them, and the charges of surveying the warrant.

This was objected to. The agreement, if such there was, is capable of other proof. This is evidence of a secondary nature.

Per cur. The minutes of that board have uniformly been read to show what passed before them. It is highly probable this agreement should be proved in no other way.

The plaintiff then offered another warrant for 300 acres, dated 14th

March 1786, to the defendant under which he wished to obtain a return of the lands in question; and it was said, that he had thereby disaffirmed the contract. He trifled with the agreement; never obtained a return of his first survey, or a meeting of the referees; and in short, had done nothing whatever to carry the agreement into execution.

The defendant's counsel answered, that the wishes of the defendant could not possibly be inferred from the warrant of 1786, which called for the adjoining lands. As to the lessor of the plaintiff calling on him to return his survey, he must show himself interested therein in the first instance. The lessor of the plaintiff was more immediately bound to procure a meeting of the referees, as he was to receive the amount of their valuation, and ought to have furnished the account of surveying fees, which he had paid. But if disaffirmance of the stipulations before the Board of Property, would affect the title of the lands in dispute, the first act of that kind, was by the commencement of the present suit, which was brought to April term 1772, not to enforce the payment of the money, but to recover the specific land. The fact however was, that M'Call died shortly after the reference was agreed upon. Besides, the warrant of 1786, was taken out nearly fourteen years after bringing this ejectment.

Per cur. The case has assumed a new shape. It is asserted on the one side, that the title of the plaintiff, if he ever had any, is extinguished by his agreement. On the other hand it is contended, that the defendant has infringed the contract, and the plaintiff offers this warrant of 1786 to prove it. Regularly, the title must be tried as it was at the time of the demise laid, but in a variety of instances, acts done since, may beshown on either side, illustrative of the truth of certain facts, or of the intentions of the parties. No evidence has been given to show what either party did respecting the agreement, between December 1768 and April term 1772, when this ejectment was commenced. If the lessor of the plaintiff was not to do the first act, he certainly should have gone on *pari passu*, with the defendant; and upon the death of M'Call, he ought to have applied to the defendant to agree to another, arbitrator, and bring in his account of what he had paid for the survey. Nothing of this kind is shown, but a suit has been brought for the recovery of the land. Therefore the taking out a warrant in 1786, without proving that some other act disaffirming the contract, was

done before April 1772, cannot show that the defendant first rescinded the contract.

The evidence must therefore be overruled.

At length under the recommendation of the court, it was agreed, to submit the case to the six jurors who attended the view, to do what was equitable and just, between the two parties.

Messrs. Hamilton and Watts, *pro quer.*

Messrs. Duncan and Riddle, *pro def.*

DECEMBER TERM, 1801.

CORAM—SHIPPEN, CHIEF JUSTICE, YEATES, SMITH AND BRACKENRIDGE,
JUSTICES.

ELIZABETH TUCKER *against* MARIA HASSENCLEVER, ELIZABETH SHAL-
LUS and ADAM MELCHER who survived JACOB MELCHER.

MARY CLIFTON by her guardian JONATHAN WILLIAMS *against* Same.
FRANCES CLIFTON by same guardian *against* Same.

A will, beginning with "I direct all my just debts and funeral expenses to be paid by my executors," and then devising four pecuniary legacies and five tracts of land, and concluding, "the rest and residue of my estate, real and personal, I give to my four brothers and sisters, A, B, C and D." The pecuniary legacies, on a deficiency of personal estate, are chargeable on the lands.

CASE stated. Isaac Melcher, esq. of Græme Park, in Horsham township, in Montgomery county, being seized of estate personal and real, made his last will and testament in the words following, dated 22d May 1788.

"It is my will, that my just debts and funeral expenses be fully paid and satisfied by my executors hereafter named, as soon after my decease as possible. Item, I give and bequeath to my niece Maria Vanderen, the sum of 300*l.* money of Pennsylvania, to be paid her in gold or silver coin on the day of her marriage, or arrival at lawful age, which ever shall first happen, meanwhile to be placed out at interest from one year after my decease, on good real security, for her use, and in case of her death in an unmarried state, then to sink into my residuary estate. Item, I give and bequeath to Miss Eleanor Clifton, of Philadelphia, the sum of 500*l.*, to be paid to her one year after my decease, and in case of her death without issue, to be equally divided among her three sisters, Elizabeth, Mary and Frances, or the survivors of them. Item, I give, devise, and bequeath unto Horatio Lawrence, son of J. Caldwell, and to his heirs and assigns, my five tracts of land, No. 15, 16, 17, 18 and 19, situate at Logstown, now called Montmorin, in the county of Westmoreland, estimated at 3000*l.*, to hold to him, his heirs and assigns forever; and I do further give and bequeath to him the sum of 100*l.*, to be paid to him at lawful age, meanwhile to be placed out at interest, on good security, for his use; but in case he departs this life unmarried, the devise of lands and bequest of money to him made as aforesaid shall be void, and the whole sink in my residuary estate. Item, I give and bequeath to my friend Christopher Baker, of the city of Philadelphia, scrivener, the sum of

50%. as acknowledgment of services received, to be paid to him one year after my decease. Item, the rest and residue of my estate real and personal whatsoever and wheresoever, I give devise and bequeath unto my dear brothers and sisters, Adam Melcher, Jacob Melcher, Maria Hassenclever and Elizabeth Shallus, (the wife of Jacob Shallus) their heirs and assigns forever as tenants in common, and to be equally divided between them share and share alike, provided always, that my sister Maria Hassenclever keep the whole in her possession, during her widowhood. Lastly, I do hereby nominate and appoint William Clifton, Andrew Eppele and Jacob Lawersweyler, executors of this my last will and testament, ratifying," &c.

The said Isaac Melcher died, seized of the said real estate in fee simple, and possessed of the said personal real estate absolutely, on the day of ; and at the death of the said Isaac, all the legatees and devisees in the said will named, were living, to wit, Maria Vandaren, Eleanor Clifton, Elizabeth, Mary, and Frances Clifton, Horatio Lawrence, Christopher Baker, Adam Melcher, Jacob Melcher, Maria Hassenclever, and Elizabeth Shallus.

Subsequent to the death of the said Isaac Melcher, Eleanor Clifton one of the legatees in the said will named, died on the 22d day of July 1791, leaving no issue. Christopher Baker another of the legatees, died on the day of ; and Jacob Melcher another of the residuary legatees died on the 22d day of July 1790.

It is agreed, that there are no assets in the hands of the executors in the said will named, out of which the said legacies or any part thereof can be paid and satisfied ; and that the value of the lands devised is to a greater amount than the legacies in the said will mentioned.

The question submitted to the court is, whether the lands devised in and by the said will are liable to the payment of the said legacies ; and whether the said residuary legatees are chargeable therewith, on account of the said devises and of the said lands, into the possession of which they entered after the said death of the testator ? If the court shall be of opinion from the preceding statement, that the said residuary devisees are liable on account of the said land, to the payment of the said legacies, then judgments to be entered for the plaintiffs, with costs of suit. But if the court shall be of a different opinion, then the judgment to be entered for the defendants.

The case was argued last term by 'Messrs. Rawle and S. Levy for the defendants, and by Messrs. Ingersoll and Adams for the plaintiffs.

For the defendants it was urged, that the words rest and residue of my estate real and personal, can only mean the remainder of his personal estate, after payment of his debts, funeral expenses and legacies, and of his lands after taking therefrom the five tracts of land devised to Horatio Lawrence. In the beginning of the will, the words are, my just debts and funeral expenses shall be paid as soon as possible, but legacies are not mentioned. If there had been no residuary clause, it cannot be pretended, that the legatees could have any claims to be satisfied out of the real estate. It is a rule in the construction of wills, that when a testator has given away all his interest and estate in certain lands, so that if he were to die immediately, nothing remains undisposed of, he cannot intend to give any thing in these lands to his residuary devisee. Willes 297. A residuary devisee cannot take a devise of lands which has been lapsed, though it is otherwise as to personalties. 2 Bla. Rep. 736. Goodright v. Opie Fortesc. 184. S. C. 8 Mod. 123. Wright v. Horne, 8 Mod. 222. A residuary legatee shall have no contribution from specific legatee. 2 Equ. Ca. Abr. 552. pl. 7. Pecuniary legacies if assets are wanting, shall be paid in average. 1 Wms. 127. But specific legacies are not bound to abate in proportion. 1 Wms. 422. They are not to be broken into in order to make good a pecuniary legacy, and much less shall pecuniary legatees on a deficiency of assets, have any remedy for their legacies against a devisee of land. 1 Wms. 201. 1 Vern. 31. And every devisee of land is as much a specific legatee, as a pecuniary legatee. 1 Wms. 678. 3 Wms. 324.

It cannot be denied, that the personal estate of a testator is the primary fund for the payment of all his personal debts, or general legacies. 2 Equ. Ca. Abr. 369, c. 5. 2 Cha. Rep. 273, Prec. Cha. 8. 2 Vern. 125, 302.

Now it is apprehended, that exclusive of these cases, where lands are expressly charged by the testator for the payment of his legacies, there are only five other cases mentioned in the books, wherein they have been held to be so charged.

1. When there is a necessary implication to such effect, as in *Alcock v. Sparhawk*, 2 Vern: 228. One by will devised his land to his brother (who was his heir at law) in fee gave different legacies, and made his brother executor, desiring him to see his will performed. It was held that the land was chargeable with the legacies. Such from the very nature of the case, must have been the testator's intention.

2. Where the executors have been impowered to sell lands, and the amount has thereby become equitable assets, as in *Kidney and Williams v. Coussmaker*, Ves. jr. 436. Devise of land to be sold, money produced by the sale was charged with simple contract debts, on the intention, though doubtful.

3. Where the legatee is a meritorious creditor, as a wife, child, brother or sister. It was so laid down in *Elliot v. Hancock*, 2 Vern. 148, in the case of a child. The father gave land to his younger son and made him executor, and gave an annuity of 5*l.* per annum to his eldest son, but did not expressly charge the land. A creditor is considered as a purchaser for valuable consideration. 1 Cha. Ca. 10. And children are in equity, considered in the nature of creditors. Pow. on Powers 168.

4. Where the application is, *contra spoliatores*, as in *Joyce's case*, Nels. Cha. Rep. 155, where the defendant had embezzled the personal property.

5. Wherever lands by the decisions in England are made liable to the payment of simple contract debts, these pecuniary legatees may follow the lands. But plain words are then requisite to charge the estate of an heir; for a charge so far as the value of it amounts, is *pro tanto* a disherison. *Davis v. Gardiner*, 2 Wms. 188. If the word debts, had been omitted in the present will, they would not have been chargeable with simple contract debts in England. *Ib.* 190. Where a testator charged his lands with the payment of his legacies, it did not subject them to the payment of his debts. *Clifton v. Burt*. 1 Wms. 679.

In the present case, the plaintiffs are mere volunteers and strangers; the defendants are brothers and sisters, and are considered as meritorious creditors, entitled to testator's bounty. To Mrs. Hassenclever he devised the possession of the entire residue of his whole estate, during her widowhood. If the testator has miscalculated the extent of his personal property after payment of his debts, and has made his bequests on that ground, it is a mistake, which this court cannot rectify.

Argument for the plaintiffs. It is of no moment to consider whether the devise over to the now plaintiffs, the sisters of Miss Eleanor Clifton, is good or not. If the legacy was entailed on her, then she took the same absolutely, and her sisters succeeded thereto after her death, as her next of kin; but if the devise over is good, then they become entitled under the will.

It is obvious, that the distinctions which have prevailed in England between real and personal estate, are not equally applicable in Penn-

sylvania, where lands are made chattels for the payment of debts. 1 Dall. 481.

It is however admitted, that the distinction between general and specific legacies prevails here. But we conceive that the defendant's counsel have erred, when they considered the devise to their clients as specific. The truth is, that no specific lands, or portions of land, are devised to them; no tracts of land are particularized, no metes or bounds are set forth. The testator has devised to them the rest and residue of his estate, real and personal. He had before bequeathed four pecuniary legacies, and five specific tracts of land, and these prior claims are satisfied. If authorities are required to ascertain so clear a position, they are to be found in 3 Atky. 59. 2 Bla. Com. 514.

There is no doubt but the personal property of a testator is the primary fund for discharging his debts and principal legacies, but the rule is not restrictive on persons who make their wills. This will is silent as to what fund shall be looked to for the payment of his legacies. The two species of property are blended together in one mass, and the words rest and residue of my estate real and personal, show this. The intention of the testator shall be carried into execution, if possible, throughout the whole will. 2 Dall. 245.

The defendant's counsel have cited *Davis v. Gardiner*. 2 Wms. 188. But it will be found in the state of that case, that the expressions are, after all my legacies paid, I give the residue of my personal estate to my son, which evinced his intention that the legacies were to be paid out of his personal property. It is true, that in the close of the case, a distinction seems to be set up, as to the operation of words, charging lands with the payment of debts, on a deficiency of debts, and of legacies. But Mr. Coxe, in his judicious note, *Ib.* 190, observes, that although the court may have expressed itself more strongly in the case of creditors than of legatees, it seems that no rule of construction has been adopted in the one case which does not apply to the other. He cites a variety of cases which warrant his position. 1 Vern. 411. 2 Vern. 228. Prec. Cha. 264. 3 Wms. 95. 4 Bro. P. C. 90. Talb. Cas. 110. 1 Vez. 499. 2 Vez. 271, 313.

A classification of the cases wherein lands have been held chargeable with the payment of legacies, without express words for that purpose, has been attempted by the defendant's counsel. The correct rule we conceive is, we are to be governed by the intention of the testator in this, as in other instances of the construction of wills.

This was the criterion in *Alcock v. Sparhawk*, *Elliot v. Hancock*, and *Joyce's case*, already cited, all of which prove that

lands may be so charged without express words, pursuing the intent.

The case of *Astley v. Powis*, 1 Vez. 496, is strongly allied to the present. There the testator devised money legacies and annuities, and then gave to E. B., his heirs and assigns forever, all his manors, &c., making him executor and residuary legatee after all just debts are paid and satisfied. Lord Hardwicke observed, this would charge the real estate with the legacies, if the personal was deficient, for it does not give a specific devise of any part of the real estate, but by way of residue after the annuities, &c. which shows what was before given was out of either of those funds; and his charging the legacies on the real estate, shows an intent that debts should be paid out of either fund, for legacies are to be paid subsequent to debts, and all this is one clause. The proper construction is, to take these words, after debts paid and satisfied, as relative to and running over the whole sentence, which clearly shows the real estate is chargeable.

So in *Kidney and William v. Coussmaker*, 1 Ves. Jr. 440, the Lord Chancellor says, a very little is sufficient to subject lands to the payment of debts. Where a testator combines real with personal estate generally, all the burthens of the personal will be put on the real so combined with it. *Ib.* 444.

The case of *Nichols v. Postlethwaite*, determined at Nisi Prius at Carlisle in October 1791, is directly in point as reported in 2 Dall. 131. There I. D. seized of land and having no personal estate, bequeathed several pecuniary legacies to different persons, and all the rest and residue of his estate, real and personal, he gave to his son J., whom he appointed executor, and who after the testator's death entered into the land; and the court held it clearly, that nothing is given to the residuary legatee but what remains after payment of the legacies. These are a charge upon the testator's real estate.

What the plaintiffs rely on is, that on the face of the will it appears that the testator intended the devisee of the residue should take nothing until the pecuniary legacies were paid.

The court continued the case under advisement until this term; Smith, J. observing, that from his own knowledge, the statement in the last case could not be correct, as to the testator's having no personal estate.

And now this term, Shippen, C. J. pronounced the opinion of the court, that the testator certainly intended to charge his lands with the payment of the legacies, in case the personal estate should be deficient.

and that the court had little doubt on the point submitted to them upon the argument.

Judgment for the plaintiffs.

Vide 2 Bro. Ch. Ca. 94. 2 Ves. jr. 267. 3 Ves. jr. 545, 738.

These causes were removed to the High Court of Errors and Appeals, and after solemn argument, the judgments were affirmed in January 1803.

RESPUBLICA *against* ALEXANDER JAMES DALLAS, esquire.

The court in doubtful case, on a rule to show cause why an information in the nature of a *quo warranto* should not be filed, will not determine whether an appointment to office by the governor, be constitutional or not. The offices of city recorder, or justices of the peace, are not constitutionally incompatible with offices of trust or profit under the United States.

A MOTION was made at the last September term, for a rule on Mr. Dallas, to show cause, why an information in the nature of a *quo warranto*, should not be filed against him, for exercising the office of recorder of the city of Philadelphia, while he held the office of district attorney for the eastern district of Pennsylvania, under the United States; at the relation of the select and common councils of the said city.

The counsel on both sides, upon the argument on the motion, went fully into the merits of the question, whether the two offices were compatible or incompatible, under the constitution of this state. And after the argument had progressed a considerable length, the counsel for the relators insisted, that all the court had to look to, before they granted the information, was to see that a fair doubt was raised. 8 Term Rep. 598, 9. An information in the nature of a *quo warranto* was granted, where the right depended on a matter of doubtful law, in order to its being finally determined. Cowp. 58. If there is a doubt of the right of a corporation, the court will grant the rule. 2 Kyd. Corpor. 432.

The defendant's counsel did not controvert the authority of the cases cited. The peace and good government of the city, was immediately interested in an early decision of the question. They offered to agree to any terms which would accelerate the determination.

The court said, the case was of considerable magnitude, and the pleadings should be filed in such a manner, as to put the whole on record, in order that either side, if dissatisfied with the

decision here, might bring a writ of error. The great question could not with propriety be decided, on the rule to show cause. Doug. 382, (397.)

The following pleadings were then filed by consent.

County of Philadelphia, ss.

September term 1801.

Be it remembered, that Joseph Hopkinson, esq. cometh here into the Supreme Court of the commonwealth of Pennsylvania, and for the said commonwealth, at the relation of the select and common councils of the city of Philadelphia, giveth the court here to understand and be informed, that the city of Philadelphia is a corporation, and that the citizens of the said city now are, and for the space of two years last past and upwards, have been, and were one body, corporate and politic in deed, fact and name, by the name of the mayor, aldermen and citizens of Philadelphia; and that within the said city there is or ought to be, and for and during all the time aforesaid, there hath been, or ought to have been a recorder of the said city, to wit, at the city aforesaid, in the county of Philadelphia; and that the office of recorder of the said city for and during all the time aforesaid, hath been, and still is a public office, and an office of great trust and pre-eminence within the said city, touching the rule and government of the said city, and the administration of public justice, within the said city; and that Alexander James Dallas, esq., late of the city aforesaid, on the first day of September, in the year of our lord 1801, did use and exercise, and from thence continually afterwards, to the time of exhibiting this information, hath there usurped and exercised, and still doth there use and exercise, without any lawful warrant, grant or right whatsoever, the office of recorder of the said city, and for and during all the time aforesaid, hath there claimed, and still doth there claim, without any lawful warrant, grant or right whatsoever, to be recorder of the said city, and to have, use and enjoy all the liberties, privileges, jurisdictions, powers and authorities to the said office of recorder, belonging and appertaining; which said office, liberties, privileges, jurisdictions, powers and authorities, he the said Alexander James Dallas, esq., for and during all the time aforesaid, upon the said commonwealth hath usurped, and still doth usurp, in contempt of the said commonwealth, and the laws thereof, and to the great damage of the said commonwealth. Whereupon, the said Joseph Hopkinson prayeth the consideration of the court here in the premises, and that due process of law may be awarded against him, the said Alexander, in this behalf, to make him answer to the said commonwealth, and show by what war-

rant he claims, to have, use and enjoy the office, liberties, privileges, jurisdictions, authorities and powers aforesaid.

Joseph Hopkinson.

And the said Alexander James Dallas, by Joseph B. M'Kean his attorney, comes and saith in answer to the information above stated and filed, that he was duly commissioned and appointed recorder of the said city of Philadelphia, by the Governor of the commonwealth, as appears by a commission to the court here shown, bearing date the _____ day of _____ 1801, signed by the governor of the commonwealth, and sealed with the seal thereof, and now in full force; and the said Alexander James Dallas saith, that by virtue and warrant of the said appointment and commission, he claims to have, use and enjoy, during the time in the above information mentioned, the office of recorder of the said city of Philadelphia, together with all the privileges, powers and jurisdictions thereof, and thereto appertaining.

J. B. M'Kean attorney for A. J. Dallas.

And the said Joseph Hopkinson in replication to the foregoing plea, comes and saith, that the said Alexander James Dallas, esq., in the foregoing information filed, holds and exercises, and for and during all the time mentioned in the said information, did hold and exercise an office of trust and profit under the United States, to wit, the office of district attorney for the eastern district of Pennsylvania; and that by the constitution of the commonwealth of Pennsylvania, it is declared that no person holding or exercising any office of trust or profit of the United States, shall at the same time, hold or exercise the office of judge, secretary, treasurer, prothonotary, register of wills, recorder of deeds thereof, or any office in this state, to which a salary is by law annexed, or any other office, which future legislatures shall declare incompatible with offices or appointments under the United States.

Joseph Hopkinson.

And the said Alexander James Dallas saith, that he the said Alexander James Dallas doth not hold the office of judge, secretary, treasurer, prothonotary, register of wills, recorder of deeds, nor any office in this state, to which a salary is by law annexed, nor any other office which the legislature has declared incompatible with offices or appointments under the United States, within the words, intent and meaning of the constitution of Pennsylvania.

J. B. M'Kean.

And the said Joseph Hopkinson saith, that the said Alexander

James Dallas doth hold the office of a judge ; to wit, the office of recorder of the said city of Philadelphia, and that he doth hold an office within this state, to which a salary is by law annexed.

Joseph Hopkinson.

To which there was a demurrer and joinder in demurrer ; and an agreement signed by the counsel, that the pleadings should be drawn into form, in case of a writ of error.

The case was argued at the last term by Messrs. Lewis, E. Tilghman and Hopkinson on the part of the relators, and by Messrs. Ingersoll and M'Kean on the part of the defendant.

Arguments for the relators. It is a matter of perfect notoriety, when the new constitution of this state was formed on the 2d September 1790, that great jealousies were entertained of the general government of the United States. The constitution agreed to by the convention of the United States of America, on the 17th September 1787, was assented to and ratified by the convention of Pennsylvania on the 12th December following. Many persons affected to fear a consolidation of the state governments, and dreaded lest the power of the union should overshadow the independent sovereignty of the several states. To prevent these evils, the new constitution carefully guarded against an union of offices, and to form a just construction of it, our minds must be carried back to the period wherein it was framed, and embrace in one extended view, the fears as well as hopes of the contending parties, in this important question then agitated.

The present dispute turns on the 8th section of the 2d article of the state constitution. Speaking of the governor's power of appointment to office, these words are used ; " No member of congress from this state, nor any person holding or exercising any office of trust or profit, under the United States, shall, at the same time, hold or exercise the office of judge, secretary, treasurer, prothonotary, register of wills, recorder of deeds, sheriff, or any office in this state to which a salary is by law annexed, or any other office, which future legislatures shall declare incompatible with offices or appointments under the United States." 3 St. Laws XXVII.

The 1st section of the 5th article of the same constitution, fixes " the judicial power of this commonwealth, as vested in a Supreme Court, in Courts of Oyer and Terminer and General Gaol Delivery, in a Court of Common Pleas, Orphan's Court, Register's Court, and a Court of Quarter Sessions of the Peace for each county, in Justices of the Peace,

and in such other courts as the legislature may, from time to time, establish."

An act "to incorporate the city of Philadelphia," passed on the 11th March 1789, 2 St. Laws 654. By § 14, the mayor and aldermen, or a majority of them, were impowered to elect a recorder, who was thereby vested with all the powers and jurisdictions of a justice of the peace within the city, for the term of seven years. By § 19, the mayor, recorder and aldermen of the said city, were severally and respectively declared, to have all the jurisdictions, power and authorities of justices of the peace, and justices of Oyer and Terminer and Gaol Delivery for the said city. And by § 22, it was enacted, that the mayor or recorder might issue his writs of *capias* into any other county, to take the body of any person indicted or outlawed, &c.

This charter of incorporation was afterwards altered, "to render it more similar to the frame of government of this commonwealth," on the 4th April 1796. 4 St. Laws 75. By § 4, the governor is impowered to appoint one recorder and fifteen aldermen for the said city, who shall hold their offices during good behavior, with the powers and privileges before annexed to their several offices, legislative powers only excepted.

Thus it appears that the city recorder is a justice of the peace of Oyer and Terminer and of General Gaol Delivery, and that his power spreads over the whole penal code. If his continuance in office was once limited to seven years, so were the judges of this court, under the old constitution. He is now placed on the same footing with them, *quamdiu se bene gesserit*. If it be objected that he receives criminal and not civil jurisdiction, we ask, where does the constitution draw this line, in defining the character of the judge? and moreover, if powers of a criminal nature are essential features in the character of a judge, do the justices of the Court of Common Pleas in England, lose that appellation?

If the argument, *propter excellentiam*, is urged, to show that the office of recorder of the city is not within the meaning of the constitution, we assert, that to suppose the station of recorder of a populous city less dignified than that of an associate justice of the Common Pleas in this state, would be ludicrous indeed! We admit, that where a suit is directed by a British statute to be brought in a court of record, it must be in the king's courts at Westminster, because inferior courts have not power to grant *essoyn*, protection or wager of law, and so is Cro. Car. 146. But suppose an offence created by law in this state,

and it should be committed in the city, would not the Mayor's Court have jurisdiction of it, as a court of record?

The word judge has the same import, whether taken in its vulgar or legal sense. Thus in holy scripture: The Lord shall judge his people. Deutr. c. 32, v. 36. God is judge himself. Psalms c. 50, v. 6. To God the judge of all. Hebr. c. 12, v. 23, &c.

A judge is a person who is invested with an authority to determine any cause or question, real or personal. 2 Cunn. Dict. And several instances are cited, wherein it is synonymous with the term justice. So under the word justice, the character of different judges is included.

Judge is a chief magistrate in the law, to try civil and criminal causes, and punish offences. Jacob's Law Dict. Nothing is more to be avoided in a free constitution, than uniting the provinces of a judge and a minister of state. 1 Bla. Com. 269. The process out of the Court of Common Pleas is returnable before our justices at Westminster. 2 Bla. Com. Append. III. The judges of this court are four in number, one chief and three puisne justices. *Ib.* 40. Speaking of the King's Bench, the terms judges and justices are used indiscriminately. *Ib.* 41. 4 Inst. 73. If a man slay the chancellor, treasurer, or the king's justices of the one bench, or the other, &c. 4 Bl. Com. 84. Assaulting a judge is made punishable, &c. *Ib.* 125. If a judge of the Court Common Pleas is made a judge of the Court of King's Bench, &c. 5 Bac. Abr. 557.

Moreover it will appear by the language of our own laws and constitutions, that the words judges and justices, are used promiscuously. Thus, in the act of 22d May 1722, for establishing courts of judicature in this province, (Galloway's edit. 114. Miller's edit. 84,) there shall be three judges of the Supreme Court commissioned, one of whom shall be distinguished as chief justice; and every of the said justices shall have power to issue process returnable to the said court, and grantable by the said judges, &c. § 11. The judges shall go the circuit, and generally do all things as fully as justices of Nisi Prius in England may or can do, § 12. The said judges shall administer justice, &c. as fully as the justices of the Court of King's Bench, Common Pleas and Exchequer at Westminster, or any of them, may or can do, § 13. The writs shall be tested in the name of the chief justice, or one of the other justices, § 16. The members of the county courts of Common Pleas are stiled justices, § 21.

We find in the old state constitution of September 28th 1776, these words in § 20. The president, with the council, shall have power to appoint and commissionate judges, naval officers, judges of the ad-

miralty, &c. They shall sit as judges, to hear and determine on impeachments, taking to their assistance, for advice only, the justices of the Supreme Court. 1 St. Laws, Append. 58.

Under the present state constitution, the judges of the Supreme Court shall be justices of Oyer and Terminer and General Gaol Delivery in the several counties. Art. 5, § 8. The president of the Courts of Common Pleas in each Circuit, and the judges of such court, shall be justices of the peace, so far as relates to criminal matters. Art. 5, § 9.

By the act of 13th April 1791, § 15, it is directed, that no judges of any court of record mentioned in this act, shall practice as an attorney or counsellor, in any court of justice in this commonwealth, or elsewhere. The wording of this clause was expressly intended to exclude the recorder of the city from this general provision, and must be regarded as a strong legislative exposition, that under the constitution he was considered as a judge.

It has been alleged, that the judge intended to be excluded by the constitution, from holding an office under the general government, was such only as did not receive fees in the ordinary discharge of his duties.

The recorder is the great law officer of the corporation, and receives a salary of 500 dollars yearly, under an ordinance of the city, and only receives fees for ministerial acts, when he affixes the city seal to the mayor's certificates. The position is not correct, that a judge by the constitution could not take fees. The exclusion from fees or perquisites of office, is confined by the 2d section of the 5th article, to the judges of the Supreme Court, and the presidents of the Courts of Common Pleas, and would not comprehend the associate justices of the latter court; and it might as well be contended, that the three persons, who were to be associated with the judges of the Supreme Court, and the presidents of the Court of Common Pleas, as judges of the High Court of errors and Appeals, might well hold an office of the first trust under the United States, if they had not been entitled to the sum of six dollars for each day's attendance in court, under the 21st section of the law of 13th April 1791.

But it will be urged, that the recorder is a mere corporation officer, originally elected by the mayor and aldermen, and that the disqualification insisted on, would operate too far on corporate bodies. To this it is answered, that the words of the constitution are, judge, &c., or any office in this state, not of the state; that the recorder receives his appointment from the governor, and is therefore as much a state officer as a

prothonotary, whose duties are bounded by the limits of his country; and that the exception only goes to judges sitting in court to determine controversies, and persons having fixed salaries. Though the recorder, under the incorporating act of 1789, was not appointed by the Executive Council, nor chosen immediately by the people, yet he was a state officer mediately chosen by the people. He would have been liable to impeachment for misbehavior in office, under the old constitution, though the same was not specially provided for therein. The objection that the recorder should have been originally appointed by the Supreme Executive Council, only proves that there has been no regular constitutional appointment of a recorder for the city, until the law of 1796.

The cases from the English books do not apply to the office of a recorder here. The recorder of London may have a deputy. Kyd. Corpor. 426. But this will not be pretended to amongst us. It is admitted, that the office might be so constituted, that one might sustain the character of a recorder without exercising the functions of a justice of the peace; and that if his power of judging was taken away, his disqualification would cease. The question now is, as to his exclusion, under the power he now possesses.

In *Nicholls v. Johns*, 1 Dall. 184, the clerk of the Mayor's Court was said by the present governor, when Chief Justice, to be a public officer, concerned in the administration of justice, and to resemble in all respects the prothonotary of the Supreme Court. *Ib.* 189 (note.) It was admitted, that if he had been appointed or chosen by the corporation, he would not be a state officer. Now, if the recorder is at least as much concerned in the administration of justice, and possesses a superior grade of office under the governor's appointment, he must surely be a state officer also.

It will appear by a reference to the minutes of the convention of 10th February 1790, (pa. 82, 83) that the then Chief Justice, with a few others, wished to restrict the disqualification to the judges of the Supreme Court, other court of general jurisdiction, and the presidents of the Court of Common Pleas; but the motion failed by a great majority. From the same minutes (pa. 129) it also appears, that on the 24th February 1790, the committee appointed to revise and correct the report of the committee of the whole, made a report, including persons in the commission of the peace, from the disqualification; but it was rejected the next day by a majority of 44 against 15, and the 8th section of the 2d article was carried as we now find it, (pa. 138.)

[Mr. Lewis stated, that he had moved in convention to strike out the word judge in the article now under consideration, and in lieu, thereof, to insert the words justices of any court. (Min. Convent. 139.) This was done to increase the disqualifications, to which in a variety of instances he was strongly opposed ; but he was of opinion, that the term justice had a more precise and appropriate meaning than judge, and signified one sitting in court to decide on matters either of a criminal or civil nature.]

On the 21st August 1790, a committee was appointed to revise, correct, and arrange so much of the constitution as had been adopted, (Min. Convent. 176) who made a report in part on the 30th of the same month ; (*Ib.* 195) and all further discussion was closed on the next day ; (*Ib.* 205) but on the 28th August, Mr. M'Lene moved, that corporation officers should be excepted in the disqualification clause, but it was determined in the negative. (*Ib.* 194.)

It may further be objected, that there are cases wherein persons have sustained commissions as well under this state as the United States, at the same time ; such as Francis Hopkinson, Matthew Clarkson, and others. To this it is answered, that those instances passed *sub silentio*, and were not disputed. But in the case of Mr. Robert Wharton, the late mayor of the city, who was commissioned as captain of a troop of light horse, the opinion of Mr. Ingersoll, then attorney general, was taken on the compatibility of the two offices, and relying on that opinion, he resigned his military command with great regret.

Upon the whole, the court will consider what is the true construction of the constitution on the point submitted to their decision. Technical rules, which might exist in the construction of a deed or a will, do not apply here. The question solely is, what did the framers of this memorable instrument mean when they used the word judge ? Does it apply to the present office ? If it does not, it must be solely on the ground that no civil jurisdiction is annexed to it. But it is well known, that the judges of the Court of King's Bench had only criminal jurisdiction originally. The civil branch ensued on a mere fiction. That jealousies of the general government existed, there can be no doubt ; they were deeply rooted in the minds of the members of the convention. They have provided in the 22d section of the 9th article of the constitution, that no standing army shall, in time of peace, be kept up without the consent of the legislature ; and the military shall in all cases, and at all times, be in strict subordination to the civil power. Did a plain simple farmer, in the charac-

ter of a secretary, treasurer, prothonotary, register of wills, recorder of deeds, or sheriff, excite their strongest fears, and were they perfectly tranquil at the influence necessarily consequent on the important office of recorder of an opulent, commercial city? Had they forgot, that royal influence extends itself more readily into corporations, than any other part of the body politic? And did they conceive, that the office being stripped of civil jurisdiction, exempted the citizens from all danger whatever?

Let it not be said, that if there is an incompatibility of office, the acceptance of the last office vacates the first though superior office. If they are incompatible, the state constitution creates an incapacity, and the court is bound so to declare it. But the national constitution has no disqualifying clause; and the courts of the United States cannot in such a case, interpose their authority.

The argument on the part of the defendant was divided into four heads. 1st. Does the 8th section of the 2d article of the constitution, include state officers only? 2d. Is the recorder of the city a state officer? 3d. Is the word judge, in the constitution, to be taken in the sense contended for by the relators? And 4th. If no defective opinion is given hereon, what will be the consequences to the community?

1. It is not denied, that jealousies prevailed against the national government, when the state constitution was formed. To a certain extent, and confined within due bounds, such sentiments conduced to the preservation of liberty; but overweening repulsive passions, have the worst effect in society, by presenting every public measure in a false light. The state governments should support each other, and be severally supported by the Union at large.

The bare reading of the 8th section of the 2d article, will satisfy any reasonable mind, that none but state officers are comprehended therein. The object of the section was to define the power of the governor, as to the appointment of officers of the state; and cannot be extended to corporation officers, then eligible by themselves, to the duties whereof a salary was annexed, not by law, but by a city ordinance. Under a different construction, the treasurer and clerks of the corporation would be disqualified from holding an office of trust or profit under the United States which will scarcely be insisted on. The clause relates to the state secretary and treasurer only. Either all or none of the corporation officers are excluded.

2. The 3d section of the 7th article of the present constitution, provides, that the rights, privileges, immunities and estates of corporate bodies shall remain, as if the constitution had not been altered or

amended. Consequently, the city having been previously incorporated, the old constitution of 1776, must determine, whether the recorder was a state officer or not. By the 20th section of the plan or frame of government, the executive council had power to appoint and commissionate judges, &c., and all other officers, civil and military, except such as are chosen by the general assembly or the people. A state officer must necessarily have been appointed or chosen in one of these modes; and if corporation officers are considered as state officers, it must follow, that the incorporating act of 1789, would violate the constitution. The minutes of the council of censors are replete with proofs on this head. (pa. 140, 141.) The law of the 4th April 1785, (Loose Acts, pa. 546,) was passed in conformity to the opinion of the censors, and declared, that the nomination and appointment of all officers necessary to the execution of the laws of this commonwealth, except those specially reserved to the general assembly or people, should be made by the executive council. And hence, the laws giving the authority of justice of the peace to the chief burgess of the borough of Lancaster, and to the burgesses of the boroughs of Carlisle and Reading, were declared to be so far contrary to the constitution, by an act passed 13th September 1785. (*ib.* 634.)

If the city recorder had been a state officer, he would immediately have become a justice of the Court of Common Pleas. The difficulty on this score is obviated by considering him a mere corporation officer.

Under the 9th section of the constitution of 1776, the members of the house of representatives had power to grant charters of incorporation. The exercise of corporation rights, is under the control of the state courts; and little danger can be apprehended from them. The Supreme court hath all the authority of the Court of King's Bench on this head.

Again. By the 40th section, of the old constitution, every officer whether judicial, executive or military, in authority under this commonwealth, were directed to take certain oaths. The test laws were repealed a few days after the act of incorporation; but the oath of the corporation officers differed from that prescribed by the above section. The office of recorder must continue as to the point in question, in the same state, as when it was first created. At that time it was considered not as a state, but as a mere corporation office, and there was no distinction between it and any other subordinate office of the corporate body. The recorder was neither appointed under the commonwealth, nor took the oath prescribed by the constitution; and therefore on the 2d September 1790, when the new constitution was agreed

to, he might well hold that office and another under the United States.

The law of the 4th April 1796, was passed on the "prayer of many of the citizens of Philadelphia, for such alterations in their charter of incorporation, as might render it more similar to the frame of government of this commonwealth," but neither professed to make, nor did it make the recorder a state officer. It assimilated the police of the city to that of the state, but though the citizens wished the appointment of the recorder to be by the governor, it did not create him a state officer, appointed under the constitution. The law left him in this particular as it found him. The legislature cannot constitutionally appoint judges and justices, but it may superadd jurisdiction and powers to constitutional appointments.

The case of *Johns v. Nicholls*, cited by the relators, is not applicable. The city corporation were not authorized to elect the clerk of the city court; but the mayor and aldermen had the express power of choosing their recorder.

It is moreover asked, upon what grounds, did the incorporation act of 1789, in the proviso in the 14th section enact, that the recorder elected, might be impeached for misdemeanor in office, before the council, when the 22d section of the old constitution had made the same provision, as to every officer of the state, whether judicial or executive? Is not this likewise, a legislative exposition, that the recorder was not considered a state officer?

3d. It has been already remarked, that the recorder's office has no salary annexed to it by law, but the compensation for the services, is fixed by a city ordinance. But this disqualification has not been pressed during the argument. It remains then to examine, whether the defendant can be deemed a judge, within the true meaning of the constitution.

In England, a recorder is the mouth of the corporation, and a justice of the peace. (*Priv. Lond.* 16.) That of London, includes Southwark. (*Ib.* 23.) He is the principal assistant of the mayor, &c. to administer justice. (*Ib.* 63.) He is also a justice of Oyer and Terminer. (*Ib.* 64.) One may be recorder, without being a justice of the peace. Giving a wrong opinion, is no breach of his corporate duty. 2, *Kyd. Corpor.* 80. It is his principal duty to advise the corporation, in matters of law. *Ib.* 82. In London, he may have a deputy. *Kyd. Corpor.* 426. The customs of London, shall be tried by the certificate of the mayor and aldermen, certified by the mouth of their recorder. *Co. Lit.* 74. *Cro. Car.* 516. 1 *Bl. Com.* 76.

The word judge, in our constitution must be taken in a fixed

legislative sense. It is used without any addition, and only refers to the judges of the Supreme Court and Common Pleas. Judges may sometimes be styled justices in the books, but we believe no passage can be shown in any correct writer, wherein justices of the peace have been called judges, either in the technical or vulgar meaning of the word. Under the words of the statute of 4 and 5 Phil. and Mar. c. 5, Courts of record, the four courts at Westminster only are intended. 6 Co. 20. The forgery of a false deed on stat. 5 *El.* c. 14, cannot be prosecuted in an inferior court. 9 Co. 118. On the statute of 21 H. 8, c. 13, concerning non-residence, the prosecution cannot be in an inferior court. Cro. Car. 146. Nor even at the assizes. 2 Stra. 1103. Hut. 101. W. Jo. 198. The words "any of the king's courts" in that statute will not include the sessions. 1 Burr. 543, 545.

By the statute of 12 and 13 Will, 3, c. 2, § 3, no person having a pension from the crown, or holding any office of profit, shall sit in the house of common; and by stat. 1 Geo. 3, c. 23, the commissions of the judges were to remain in full force, notwithstanding the demise of the crown. The twelve judges only held commissions during good behavior. The recorder of London or any other city would not be included in either of those acts. A justice of the peace is not within the statute of 25 Ed. 3, c. 2, notwithstanding the general words in his commission. 1 H. H. P. C. 231. 9 Co. 118, b. Cro. El. 87, 697. By adverting to each section of the 5th article of the constitution, touching the judicial power of this commonwealth, it will be seen that the word judge is used, as applicable only to the Supreme Court, and courts of Common Pleas. Vide § 2, 3, 5, 7, 8, 9. And the law of 13th April 1791, pursues the same language throughout. 3. St. Laws 92. But if the recorder of the city was strictly and properly a constitutional state judge, he could not practice as a counsel or attorney, nor take fees. He now takes bench fees, which is not done by another judge of the state courts.

In the large undefined acceptation of the term judge as insisted on by our adversaries, the constitutional exclusion would operate against commissioners of bankrupt, who have a power to commit, referees, who have the like power,—and against the members of the Board of Property, as well as many others, who exercise authority of a judicial nature. The fear of national influence has siezed some people, though its sphere is not enlarged. Francis Hopkinson was at the same time an alderman of the city, and judge of the Admiralty. Matthew Clarkson was mayor and commissioner under the Spanish treaty. Michael

Leib was a justice of the peace and member of congress. Jacob Graeff was likewise a justice, and a collector of excise; and James Ash was an alderman and collector of the stamp duties. [Mr. Ingersoll said, that he had been consulted, when attorney general, in the case of Ash, and thought the two offices, which he held, were compatible, as he did not hold the collectorship immediately under the United States' government; but in the instances of Jonathan Williams (commissioned as a colonel of artillery) and Robert Wharton, (commissioned as a captain in the cavalry) his opinion was, that the several offices, which they held respectively, were incompatible.)

Reference had been made by the relators, to the minutes of the convention, which had framed the new constitution. They would also refer to them. The draught of the constitution first proposed, was reported by the committee, on the 21st December 1789, (pa. 39) in which there was no clause of exclusion.

On the 5th February 1790, the chairman of the committee of the whole, reported their plan of government, wherein the exclusion was very broad, in the 8th section of the 2d article, (pa. 63) and run thus: "no member of congress from this state, nor any person holding or exercising any office of trust or profit under the United States, shall, at the same time, hold and exercise any office whatever, otherwise than in the militia in this state.

Amendments were moved for on the 9th and 10th February 1790, (pa. 80, &c.) and the 8th section adopted, (pa. 85.)

On the 24th February 1790, the committee appointed to revise and correct the report of the committee of the whole, made their report, (pa. 126.) Amendments of this 8th section were moved for the next day, and amongst others, Mr. Lewis moved to strike out the word judge, and in lieu thereof, to insert the words justices of any court, which was determined in the negative, and the 8th section adopted, (pa. 139.) The refusal of this amendment shows strongly the sense of the convention, that they understood the word judge, in the sense we now contend for; and another amendment moved for, as to the exception of corporation officers on the 28th August 1790, (pa. 194) evinces, that they were not considered as state officers.

4. Lastly, if the two offices of recorder of the city and district attorney are incompatible under the terms of the constitution, the necessary result will be, that the latter office is avoided thereby. It is now settled, that where two offices are incompatible, the acceptance of the last, though an inferior office will vacate the first. *Milward v. Thatcher*, 2 Term Rep. 81, 87. Even this court enforces the laws of the United States, and yet none of its members hold any office of trust

under the union. The author of the *Federalist*, instead of feeling the dread of the increase of the sphere of national influence, which our antagonists have experienced, has expressed strong fears, that the state governments would in the event, be too great and powerful for the general government of the United States.

Curia advisare vult.

This term, Shippen, C. J. pronounced the unanimous opinion of the court.

The question is, whether the defendant can legally hold the office of the recorder of the city of Philadelphia, at the same time, that he holds the office of district attorney for the eastern district of Pennsylvania, under the United States?

The words of the 8th section of the 2d article of the constitution are these ; “ No member of congress, from this state, nor any person holding or exercising any office of trust or profit under the United States, shall, at the same time, hold or exercise the office of judge, secretary, treasurer, prothonotary, register of wills, recorder of deeds, sheriff, or any office in this state, to which a salary is by law annexed, or any other office, which future legislatures shall declare incompatible with the offices or appointments under the United States.”

It is conceded by the pleadings, that Mr. Dallas holds and exercises an office of trust and profit under the United states.

The question then is, whether the office of recorder of the city of Philadelphia is an office prohibited by the constitution to be exercised by one holding such an office under the United States.

The affirmative of this question is held by the counsel on the part of the relators, who contended, that the recorder of the city is a judge within the words and meaning of the framers of the constitution.

The motion was opposed, chiefly on two grounds ; 1st, that the office of recorder is not strictly that of a judge, but of an adviser and mouth of the corporation ; and 2dly, that if he is strictly a judge, he is not such a judge, as was contemplated by the constitution in the prohibition.

As to the first question, we think there can be no doubt, but that in the strict legal sense of the word, the recorder is a judge ; he is a justice of the peace ; he is a constituent and principal member of a court of record, empowered to hear, try and determine by a solemn judgment, a number of criminal offenders against the laws and peace of the commonwealth. Lord Chief Justice Holt, in 1 Salk. 200, is made to say, wherever a power is given to examine, hear and punish,

it is a judicial power, and they in whom it is resposed, act as judges.

Much has been said to investigate the origin and nature of the office of recorder of the city of London ; but whatever other power that recorder may possess, it seems impossible to say, when he sits in a court of record to administer justice, and to hear and determine questions of law and fact, that he is not in that capacity a judge. In 1 Bac. Abr. 657, said to be written by Lord Chief Baron Gilbert, it is expressly said, that in the Court of Hustings at Guildhall, before the lord mayor and sheriffs, when any matter is to be argued and determined, the recorder sits as judge with the mayor and sheriffs, and gives rules and judgments therein.

The more doubtful question in the present case is, whether the recorder is such a judge as the constitution meant to prohibit from holding at the same time, an office of trust or profit under the United States.

It is not easy to get at the real meaning of a deliberative body. Some of its members may have meant by the same words very differently from others ; even their debates and minutes afford frequently very uncertain lights, and are therefore not to be relied on. The only true and legal way of judging, is from the words of the instrument taken all together, which they finally agree upon.

The general operative motive which induced the convention to adopt any disqualification of the nature of the present, seems to have arisen from an apprehension of a possible collision, between the general and state governments, and a jealousy lest the admission of their officers into our places of trust and power, might lead to a possible preference in the minds of the those who might hold offices under both, in favor of the general government, to the prejudice of the state government. Whether this was a reasonable or unreasonable jealousy, it is not our business to examine. They have not, however, extended it to all state offices. The question before us is, whether there are any words or expressions in the instrument, indicative of their intention either to extend the word judges to all, who in strictness of law come under that denomination, or to restrain it to judges of a particular class.

In considering this question, we acknowledge our judgments have vibrated between two opinions. We have, however, at length made up our minds to the best of our understandings, and we hope without prejudice or partiality. From the generality of the word judge, used in the constitution, without any limitation or exception whatever, and

from supposing that the mischiefs intended to be prevented by the prohibition, extended equally to the case of every judge, we were at first strongly inclined to the opinion, that every judicial officer was included in the prohibition ; but on further consideration, and analysing such parts of the instrument as relate to this subject, our opinions preponderate in favor of the contrary construction, that the recorder of the city court is not included in the prohibition.

Our reasons are these :—First, justices of the peace, a part of the judiciary power, although a numerous body of men dispersed throughout the state, and particularly designated by that name, are not *eo nomine* included in the prohibition, for which I cannot account, but on the presumption that they were not intended to be included in it, and of course that every judicial power was not intended to be included. The Courts of Quarter Sessions for each county, by the 5th article of the same constitution, are made part of the judicial power of the state, and yet are not expressly included. The city court is not mentioned in the 5th article as part of the judicial power of the state, much less, therefore, can that court, or its members, be supposed to be included in it.

Again not only some of the judicial characters, as justices of the peace, are omitted in the prohibition, but others, as registers of wills, although as constituting a part of the Register's Court, they are declared to be part of the judicial power of the state, are particularly included in the prohibition, showing the sense of the convention, that every person exercising judicial power was not intended to be included under the word judge, otherwise it would have been nugatory to have expressly included the registers.

Again, the word judge in the constitution is immediately followed by the words secretary and treasurer. These can only mean secretary of the state and treasurer of the commonwealth, and with no appearance of reason can be supposed to mean the secretary and treasurer of every corporate body within the state. If then, these general descriptions are to be restrained, and the constitution does not mean to include every judicial character in the state, what is the restriction most consonant to the general tenor of the instrument, with respect to the word judge ? The convention in other parts of their instrument, have expressly denominated certain judicial officers by the appropriate name of judges, namely, the judges of the Supreme Court, and judges of the Courts of Common Pleas, and no others ; and the subsisting laws of the state have denominated the judges of the High Court of Errors and Appeals and no others by that name ; and all these being about ninety in number

when the new constitution was framed, are generally and exclusively styled judges by the people, in contradistinction to all others who exercise judicial powers, from whence we are induced to conclude, that the word judge, in the constitution, was intended to be confined to such judges only as were thus distinguished by the constitution, the existing laws of the state and general language of the country. It is evident, it was considered there were other characters who might in future be thought proper to be included in the prohibition. It was therefore left to future legislatures to declare what other offices than those enumerated, should be incompatible with appointments under the United States.

In addition to what I have said, I would here cite by way of illustration, a case which bears in some respects upon both the points, *Dr. Greenvelt v. Dr. Burnel and others*, in *Carth.* 491. It was an action of assault, battery and false improvement, brought against the defendants as censors of the college of physicians, who had fined and imprisoned the plaintiff for mal-practice as a physician. Lord Chief Justice Holt said, that the defendants were not punishable for what they did by virtue of their judicial power, and he laid it down for a ground, that wherever a statute gives a power to fine and imprison, the persons to whom such power is given, are judges of record, and their court is a court of record. I would then ask, whether if such a court of physicians had existed in this state, would they, because they are called judges of record, have been included in the prohibition under the word judge in the constitution? I conclude not.

Upon the whole, we are of opinion that judgment be rendered for the defendant.

ROBERT YOUNG who survived ELEANOR YOUNG *against* SAMUEL PLEASANTS, surviving administrator of ISRAEL PEMBERTON.

On a suit brought against an administrator, for not conveying lands contracted to be sold by his intestate, the plaintiff must prove the contract in court, and have it recorded, before the bringing of the suit.

CONVENANT was brought on an article of agreement dated 5th April 1775, executed between the intestate and Eleanor and Robert Young, whereby the former agreed to sell to them 150 acres of land in East Fallowfield township, at 40s. per acre, payable in instalments in five years. Plea, covenants performed.

No part of the money had been paid by the plaintiff ; but in November 1779, he tendered to the defendant 442*l.* and upwards, in continental bills of credit of the emissions of 1775 and 1776. This was refused, that currency having then depreciated to 38½ for one.

In July term 1791, the plaintiff filed a bill in this court, to perpetuate testimony, and several depositions were taken thereon ; but no proceedings were had under the act of 31st March 1792, (3 St. Laws 198) nor was the agreement proved in court, or recorded according to the directions of that law.

By the court. The plaintiff cannot sustain this suit, not having taking the necessary steps pointed out by the law. It is true, the defendant has not pleaded *semper paratus*, but the 3d section of the act does not supersede the necessity of the deed's being proved in court and recorded thereon, previous to the commencement of the suit. It is incumbent on the party who seeks to enforce the contract, to do the first act, by procuring a probate of the deed and putting it on record. An administrator with the best intentions, when the contract has been ever so fairly executed by the vendee and his intestate, who has sold, has it not in his power to make the conveyance, unless the vendee puts it in his power by proceeding regularly.

Plaintiff nonsuit.

Messrs. T. Ross and Blair, *pro quer.*

Mr. Tilghman, *pro def.*

JOSEPH JORDAN and ALEXANDER WHITESIDES *against* JONATHAN MEREDITH.

The usage of plaisterers in charging half the size of the windows, at the price agreed on for work and materials, is unreasonable and bad.

Court will not grant a new trial, unless they are satisfied injustice has been done.

A talesman sworn on the jury, after being struck off the list of special jurors, is no ground for awarding a new trial.

MOTION for a new trial. The cause was tried during the present term. *Indebitatus assumpsit* was brought for plaistering two large houses in the city ; and on the trial, it appeared that the parties had agreed, on the 27th February 1797, at the rate of 2*s.* per square yard, the workmen to find the materials ; the usual price at that time being 1*s.* per square yard, if the owner of the house furnished the lime, sand, hair, &c. The plaintiffs claimed the balance of 412*l.* 9*s.* 6*d.* or 434*l.* 8*s.* 6*d.*

Some dispute arose about the price of a quantity of hair delivered by the defendant ; but the chief matter in controversy arose

from the mode of mensuration. The plaintiffs insisted, that according to the general usage of plaisterers in the city, one half part of the size of each window should be included in the admeasurement, and the sum of 107l. 12s. was said to have been charged on that ground. This was opposed by the defendant, but no argument thereon was had at the trial. The counsel on neither side summed up, but submitted their different estimates to the jury ; nor was any charge given by the court. The jury found a verdict for the plaintiffs for 876l. 11s. 10d.

Mr. M. Levy for the defendant, founded his motion on two grounds.

1st. It must be presumed from all the testimony, that the jury have adopted the plaintiff's system of mensuration. If they have done this, they have allowed the plaintiffs 53l. 16s. for materials which have never been furnished, and have committed a clear mistake, which this court will not sanctify. There might be some pretext for charging the usual price of workmanship of 1s. per yard, on account of the superior pains and trouble necessary about the windows ; but there can be none to justify a charge for lime, &c. which they never provided.

2d. Malcolm M'Donald was one of the special jurors who tried the cause as a talesman, and he was one of the persons struck out of the list by the defendant. A new trial was allowed because one of the jurors had been challenged on the principal panel, and the challenge was allowed, and he was afterwards sworn on the jury. 2 Ld. Raym. 1410.

Messrs. Ingersoll and T. Ross *è contra*. If the court shall be of opinion, that the practice of plaisterers in the particular complained of, is bad in itself, the *onus probandi* with respect to this mistake of the jury, lies on the party who excepts to the verdict. The error should distinctly be made to appear to the court, before they will interpose. It must not rest on presumption. But even presumptions do not hold here. For if the jurors have disallowed the charge made by the defendant, for the hair considered as wet, at 3s. 6d. per bushel, (concerning which they had evidence given to show that it was dry) then it follows, that they must have deducted 57l. 16s. from the plaintiff's demand. It is therefore more probable, that the jurors have made this abatement on the ground of mensuration, and they may have detected some errors in the calculation as to the remaining 4l. Suppositions will not warrant the court's interference and granting a new trial. It will not be done without solid and substantial grounds, where it is manifest that injustice has been done, or that the jury have gone against strong evidence. 2 Dall. 53.

The exception against the juror comes too late. The defendant either had, or might have had his list of the special jury before him, and could then have excepted to M'Donald's being sworn. This is not like the case in 2 Ld. Raym., where the juror, after being challenged, was sworn by a different name. A challenge may be taken to those of the *tales de circumstantibus*. 1 Tri. Per Pais 203. Jurors, of kindred to the party, should be challenged before they are sworn. Style 100. So of a juror, who had a suit at law, with one of the parties. *Ib.* 129. If a defendant appears and makes defence, he shall not have a new trial, for want of notice. 2 Salk. 646. So, if the cause has been tried by a common jury, where there has been a rule for a struck jury. 12 Mod. 567. Where one has a defence and does not use it, he shall be concluded. *Ib.* 584. If one knows of his cause of challenge and does not make it, he shall not on that account have a new trial. 11 Mod. 119. An exception to the competency of a witness come too late after the trial. 1 Term Rep. 717. These cases abundantly prove the principle which we have asserted.

By the court. The pretended usage of the plaisterers in the present instance is unreasonable and bad in itself. To charge an employer with materials never received is the height of injustice. But we have no proof that the jury have committed this error, and we are not justified in setting aside a verdict on mere conjecture. To warrant our interposition, we must clearly be satisfied, that injustice has been done, some plain mistake committed.

The defendant should have challenged the juror before he was sworn. He has slipped his time, by postponing his objection till this period. If he has been guilty of inattention, he alone should suffer for it. And so is the current of authorities in the books.

Motion for a new trial denied.

THOMAS GALLAGHER and WILLIAM GALLAGHER *against* JOHN KEAN
et al. administrators of JOHN HAMILTON.

On an appeal from the Circuit Court, to the Supreme Court, counsel must subscribe a certificate, and file the proceedings of the Circuit Court with the prothonotary before the first day of the next term.

THIS cause was tried at Harrisburgh, on the 21st October last, before the Chief Justice and Judge Brackenridge, when the jury gave a verdict for the plaintiffs for 169*l.* 16*s.* A motion was made for a nonsuit at the trial, but the same was disallowed; and afterward a motion in arrest of judgment which was overruled. The record of the proceedings of the Circuit Court was not filed in the prothonotary's office, until the 28th December, which was fourteen days after the term commenced. And now Mr. Hopkins for the plaintiffs moved that the judgment should be confirmed, as if the appeal had not been made. The counsel for the defendants had not subscribed a certificate, nor had the proceedings been filed in due time; both of which grounds were solid objections against the appeal, under the 4th section of the law of 20th March 1789. 4 St Laws 364.

Mr. Duncan for the defendants stated, that he had understood no decision had taken place on the motion for a nonsuit, the court being divided, and that there could not be an appeal, unless there had been a judgment.

By the court. It appears from the Chief Justice's notes, that the motion for a nonsuit was rejected. The members of the Circuit Court being divided, would operate as a decision on that question. The two objections which have been made to the appeal render it unavailable, under the express terms of the Circuit Court law.

Record remitted.

THOMAS SHELBY *against* JOHN BOYD and WILLIAM RICHARDSON.

In a suit for lawful money of North Carolina, court will not permit paper money to be brought into court, unless it be a legal tender.

DEBT was brought on an obligation for 1000*l.* lawful money of North Carolina, dated 30th November 1786, conditioned for the payment of 500*l.* like lawful money on the 1st November 1787. The defendants pleaded payment with leave, &c., and gave notice of the special matters intended to be insisted on at the trial, which went to prove a want of consideration.

The cause was ordered for trial in April last, at the last Circuit Court for Lancaster county, where it was agreed, that judgment should be entered for the plaintiff, and that the execution thereon should stay, until the next Supreme Court, when the defendant should be at liberty to move to pay into the court lawful money of the state of North Carolina in satisfaction of the bond, as if the same judgment had not been entered ; and if the said motion should not be made effectual by the judgment of the said court, then the judgment entered to stand for the principal and interest of the balance of the obligation in specie.

Mr. Dallas for the defendants now moved for leave to pay into court certain paper bills of credit, said on the face of them to have been emitted, in pursuance of an act of the state of North Carolina, passed on the 19th December 1785, and produced the deposition of Joseph Tagert, proving that these bills were and now are in circulation in that state, and that they sell from 12s. to 15s. for a silver dollar. The *lex loci* must govern in a case of this kind, when it appears on the bond, that it was executed in North Carolina. These bill were a legal tender at that time, and were the objects of the bond. If the the court on the trial would have allowed an offer of this money, they will do so now. It merely fulfills the contract of the parties. The court will give leave to withdraw the general issue, in order to bring money into court ; and replead it, when it does not delay the plaintiff. 2 Stra. 1271. 5 Com. Dig. 22. Pleader C. 10. Where the defendant is entitled to pay money into court, it is a matter of course before plea pleaded ; and now even after plea, it is perpetually done by a judge's order made for that purpose. 1 Term Rep. 711.

The motion was opposed by Mr. McKean for the plaintiff. The law of North Carolina is not shown, under which these bills of credit were emitted, nor is it ascertained whether they are a legal tender. The deposition of Tagert does not go to this point ; and if these bills were ever tenderable, that quality is now probably taken from them. By the 10th section of the 1st article or the constitution of the United States, no state shall emit bills of credit, or make any thing but gold and silver coin a tender in payment of debts. If the contract really contemplated such bills of credit, they might at the time have been equal in value to gold and silver ; but if they had depreciated and had not been tendered in the manner prescribed by the laws of North Carolina, they could not now be brought into court, but their specie value at the time of the contract. This suit is brought for the penalty of the

bond, lawful money of North Carolina equal in value to so much Pennsylvania currency ; and for this latter currency, judgment must be rendered. If the contract be for foreign coin, it may either be demanded as such, or its sterling value. 1 Leon. 41. If the agreement had respected the continental bills of credit, and no tender had been pleaded, the court would not suffer the paper emitted by congress to be paid into court, but only its specie value when the agreement was entered into. Here the court are wholly in the dark respecting the money offered to be paid in ; and in 1 Dall. 175, the court refused parol evidence of the value of lawful current money.

There has been great delay in the present case. A judge under all the circumstances would not have given an order to pay the money into court. Formerly money could not be brought into court, after plea pleaded. 5 Bac. Abr. 22. If it was taken out of court, and any part of the bills of credit turned out to be counterfeit, such part could not be returned. *Ib.* 6. 5 Co. 115. The defendants here relied on the want of consideration as to the bond, and gave notice accordingly. The plaintiff came prepared on that is sue, and not to examine into the value of the bills offered, or whether they were genuine or not.

Per curiam. It does not appear to us, that the bills of credit offered to be paid into court, are a legal tender, and therefore we cannot admit them to be brought into court. We cannot say, on the face of the obligation, that the contract refers to such money.

Judgment absolute.

MARCH TERM, 1802.

CORAM—SHIPPEN, CHIEF JUSTICE, YEATES, SMITH AND BRACKENRIDGE,
JUSTICES.

Lessee of JOHN STEIN and JOHANNA MAGDALENA his wife, and ANNA
SABINA SILVIUS *against* JAMES NORTH.

A letter by an uncle, inviting an unmarried nephew to come here from Germany, and promising, if he proved obedient and followed all his directions, that he should be the heir of his whole estate, can neither operate as a will, nor such a contract, whereof specific execution should be enforced

EJECTMENT for a house and lot of ground in the city of Philadelphia.

It was admitted that Casper Silvius died seized of the premises in fee, in October 1793.

It appeared in proof, that he left three sisters living in Germany, two of them being the lessors of the plaintiff, and the third named Catharine, who intermarried with one Goble, by whom she had issue three children, and afterwards with one Palaster, by whom she had issue two children. On the 18th November 1785, Casper Silvius wrote a letter from Philadelphia, to his sister Catharine, wherein among other things, he desired her “to send over her son by her first husband, and he would “pay his passage, and if he proved obedient and followed all his directions, he should be the heir of his whole estate, provided he should arrive here as a single man, and not be incumbered with a train.” Henry Goble, eldest son of the said Catharine, came from Germany, in consequence of his uncle’s letter in 1786, a single man, continued with his uncle 7 or 8 weeks, then got employment in a brewhouse, and afterwards in a tavern as a bar-keeper for three years.

He then went to Carlisle, where he kept store and died. Casper Silvius was very illiterate, and could not write. Hence it did not appear what advances he made for his nephew, or whether he had paid his passage money. The evidence was contradictory as to the terms they lived on, some of the witnesses asserting that they appeared to agree with each other; and others who lived in the house of Silvius, declaring that they disagreed, and that the uncle found much fault with him.

The defendant claimed under Henry Goble, who on the 10th August 1795, conveyed the premises for a valuable consideration, reciting the above letter of his uncle as a devise to him, with covenant of general warranty. Joseph Pleiffer, the defendants’ held the house

and lot under four other mesne conveyances, in two whereof there were also clauses of general warranty.

It was insisted for the defendant, that this letter might legally operate as a will. Any writing, by which the intention of the party to give or dispose of lands or hereditaments appears, provided such intention is not contrary to the established rules of law, will amount to a devise. The statutes of 32 Hen. 8, c. 1, and 34 and 35 Hen. 8, c. 5, have prescribed no form of words, in which the instrument, purporting a devise, shall be made. Pow. Devises 12, 13. If the intent of the donor be to make a will, the instrument will operate as such, though an actual delivery be made of it as a deed. 1 Cha. Ca. 248. S. C. Finch 195. If one express by a letter, what is his will respecting the disposition of his land, it is sufficient. Moore 177. pl. 814. Notes in writing to draw a conveyance to feoffees, but with blanks for their names, thereby to charge lands with portions for younger children, in pursuance of a power, held to amount to a will. 1 Cha. Ca. 264. A paper writing left with a will and written after it, though no codicil, yet held to be a declaration of the intention. 1 Cha. Rep. 268. A will is defined to be a declaration of the mind, in disposing of an estate, and to take place after the death of the testator. Carth. 38.

Sed per curiam. Clearly this letter cannot operate as a will. Though no particular form of words is necessary to give validity to a will; yet all the books agree, that the *animus testandi* is an indispensable ingredient. There must be an advised purpose to make a present disposition of the party's estate. Here it is but the signification of an intention to do a future act, and so not the testament itself, which must contain a present and perfect consent. Swinb. 8, 9.

It was then insisted, that if the letter could not be construed as a will, it might be considered as a contract, which would be enforced in equity. The agreement was reasonable in itself. The uncle, though married, had no children. He desired a prop to lean on in his advanced age, and accordingly pressed his sister to send over an unmarried son, by her first husband, who on the sole conditions of his obedience, and coming without followers, should be the heir of his whole estate. The nephew, in pursuance of the invitation, left his native country, and deserted all his prospects there; and if he has been obedient, and followed all his uncle's directions, of which the present jury are the competent triers, he has become a purchaser for valuable consideration.

The known rule in equity is, that what ought to be done shall be considered as done, except in the case of an estate tail contracted to be sold. 2 Vez. 634. It is of no moment that there is no seal to the instrument. An agreement may be made out in equity, by proving an instrument, from the nature of which equity will infer an agreement. 1 Pow. on Contracts 323. And from a subsequent transaction, equity will raise an agreement accessory to a precedent transaction, where the circumstances warrant such an inference. 1b. 325. Thus, it has been decreed that bonds have been considered as evidences of agreements, and obligors held to a specific performance, and not allowed to forfeit the penalty. 10 Mod. 517, 518. 2 Equ, Ca. Abr. 22, pl. 20, 21. A letter will in equity amount to an agreement, and be binding on the person signing it, if another person by action upon it show his acceptance of the propositions therein contained. 1 Pow. Contr. 287. As in *Moor v. Hart*, 2 Cha. Rep. 147. S. C. 1 Vern. 201. *Warkford v. Fatherly*, 2 Vern. 322. S. C. Freem. 291. And *Bird v. Blosse*, 2 Vent. 361. A consideration may arise, by doing or permitting somewhat to be done, to the prejudice or loss of one of the parties. 1 Rol. Abr. 22, pl. 23. It is not absolutely necessary, that the consideration for a contract, imports some gain to him that makes the contract; but it is sufficient, that the party in whose favor the contract is made, foregoes some advantage or benefit which otherwise he might have taken or had, or suffers some loss in consequence of placing his confidence in another's undertaking. 1 Pow. Contr. 344. This rule meets precisely the present case; and it was said by Ld. Hardwick, in *Grosvenor v. Lane*, 2 Atky. 181, the letters written by Mr. Peake to the aunt of the intestate, must be taken not as a mere proposal only, or a bare hint of his intention, but an absolute appropriation of the fortune by the second husband for the benefit of the infant. So in the instance before the court, the letter wrote by the uncle is more than a proposition, and amounts to an absolute engagement to make the nephew heir of his whole estate, on certain terms which have been complied with. One shall not recover in ejectment against the terms of his covenant, that the defendant shall quietly enjoy the land. Cowp. 600.

After the cause had been fully argued by the counsel for the plaintiff, the Chief Justice delivered the unanimous opinion of the court to the jury, that this letter was not evidence of such a contract as ought specifically to be executed under all its circumstances. Courts of law in this state have in a variety of instances exercised chancery powers, in order to prevent injustice. The necessity of the case gave rise to

this jurisdiction, which has been sanctified by the constitution. But to enforce the specific execution of contracts, which a court of equity would not decree, would set all property afloat, and be dangerous in the extreme. The decreeing of a specific performance is in the discretion of the chancellor, and must not be considered as an universal rule. In many instances it has been refused. Here the uncle has reserved to himself the sole right of judging of his nephews obedience to his directions, and has not submitted the determination of that point to a court and jury. The agreement was not absolute on the part of the uncle, but merely optional with him whether his nephew should succeed to his estate. Nor are we authorized to say in the present dispute, that his conduct was unreasonable. If Henry Gobie has sustained any damages under all the circumstances of the case, his personal representative may have the same fairly assessed by a jury in a proper suit. His aunts were co-heiresses with his mother, and are entitled to two-third parts of the premises, and it is fortunate for the landlord, who sets up the present defence, that he can recur to three covenants of general warranty to repair himself in damages, in case of a recovery against his tenant.

Verdict *pro quer.* for two-third parts of the premises.

Messrs. M. and S. Levy and Brinton, *pro quer.*

Messrs. E. Tilghman and M'Kean, *pro def.*

FERDINAND GOURDON (for the use of his assignees) *against* the President and Directors of the Insurance Company of North America.

Same v. Same.

A policy of insurance is assignable in equity, and every set off between the insurer and insured obtains against the assignee, unless as in the case of bonds, there has been deception on the assignee, on receiving information of the assignment.

These were two actions of covenant, brought on two policies of insurance dated 18th April 1797, the one on the cargo of the schooner Felicity, Hulings Cowperthwaite master, at and from Philadelphia to Leogane, and at and from thence back again, valued at \$20,000, and the other on the said schooner, valued at \$5,000.

The defendants pleaded *non infregit conventiones*, with notice of set-off.

The policies contained a warranty, that the schooner and cargo were American property, and they were insured against all risks, at a pre-

mium of $12\frac{1}{2}$ per cent. The form of the policies extended to the assured, his executors, administrators and assigns ; and it was stipulated therein, that in case of loss, there should be a deduction of 2 per cent, and the premium.

On the 19th April 1797, Gourdon by separate instruments assigned the two policies, the schooner, and the invoices of the outward bound cargo and bills of lading to Pratt and Kintzing, to secure the payment of a just debt. On the 15th May 1797, Gourdon assigned all his surplus property to John James and others, a committee appointed by his creditors for the use of them all rateably, provided three-fourths of his creditors shall agree thereto and shall subscribe a release, the share of any one creditor refusing so to do, to be paid to Gourdon ; and on the next day, the creditors in general empowered the committee to execute releases.

On the 23d May 1797, the schooner was captured in her homeward voyage from Leogane and carried into Port au Prince on the 27th. The cargo was there condemned in the Admiralty, but the schooner cleared on a survey, the vessel being found incapable of making the voyage, was sold, and after deducting all expenses, there remained a balance in favor of the owners of 34 dollars only.

On the 7th July 1798, Pratt and Kintzing having received their demand due from Gourdon assigned over the two policies to the committee of his creditors.

The defendants claimed a defalcation of seven protested notes given by Gourdon, previous to the assignment to Pratt and Kintzing, indorsed to the company amounting to \$15,125, but payable after the subscription of the policies, on different days ; a further sum of \$1,475- $\frac{1}{10}$ on two charges of premiums made on the 22d April and 11th July 1797, with a credit of 3 months ; and of \$2,800 paid to Pratt and Kintzing on the 27th March 1798, on the two policies, and of \$9,300 paid to the United States for duties due from Gourdon on the 3d December following.

The defendants admitted the insurance, loss and abandonment, but disagreed from the plaintiff's statement as to the times of their receiving notice of Pratt and Kintzing's assignment, and of the abandonment. They wholly denied receiving any information of the assignment of 15th May 1797. Pratt deposed to the copy of a letter, extracted from his letter-book, dated 4th May 1797, wherein he notified the company of Gourdon's assignment of the policies, &c., to the firm, and to his belief that the original was given to one of his clerks next day to be delivered. But this was encountered by the testimony of

the secretary of the company, who said, no such letter had been received, nor could the same be found on the most careful search of the papers in their office; and besides, Gourdon on the 11th December following, applied for payment of the loss in his own name. About the 10th May 1797, the creditors of Gourdon had a meeting, and Ebenezer Hazard attended as secretary of the insurance company. Whether he gave notice to the creditors of any claims for the notes of Gourdon due to the defendants for premiums, which had not then become due, did not appear, but they appointed James and others a committee to act for them. On the 7th November 1797, the company received notice of the loss, by the captain's protest being shown to and endorsed by their secretary. And on the 16th November 1797, a formal abandonment and cession was executed by Gourdon, and Pratt and Kintzing but no evidence was given when it was shown or offered to the defendants. It was agreed on the trial, that the jury should ascertain how far the defendants were entitled to a defalcation, and that the balance should be liquidated by reference.

The counsel for the plaintiff contended, that there could be no set-off beyond the 2 per cent, and the premiums of the particular policies, as well from the terms of the instruments, as from the law incorporating the company; and that under all the circumstances of the case, any further or other defalcation would be inequitable. The form of the policies extends to the insured and his assigns. Under their express words, the insurers may deduct in case of loss 2 per cent, and the premiums. This is tantamount to words in promissory notes "without defalcation." It expresses certain defalcations, and excludes others. The defendants cannot have a lien superior to other citizens; and their usual method when they doubt of the sufficiency of notes given for premiums, has been to retain the policies in their own hands.

The act incorporating the subscribers to the insurance company of North America, passed 14th April 1794, contains a clause in the 5th section, (3 St. Laws 491) that the company shall ratify, pay and discharge all just demands on their policies for any losses which shall happen, according to the tenor and effect of such policies. The words pay and discharge cannot be satisfied in their common law sense, by a set-off. The policies of the incorporated companies in England have no such words as exist in the present instance. 2 Magans. 383.

The idea generally entertained in the commercial world has been, that policies of assurance and bills of lading are assignable in their

nature. While the property is at sea, it is susceptible of no other personal possession than by delivery of the proper muniments ; and by a transfer, the privity between the original owner and his creditors, as to the right of property, is extinct.

A policy may be transferred. Though at law a chose in action may not be assigned, yet it may in equity. Per Ashurst, J. 1 Term Rep. 26. And Buller, J. classes bills of exchange and policies of assurance together. Both, says he, are assignable by the custom of merchants. 4 Term Rep. 242. So also in France, a policy is negotiable as a bill payable to order. The transfer passes the full right to the prejudice of all the creditors of the assignor. 2 Valin. Com. 45. Policies of insurance are sacred things, and must be performed with all good faith. They shall not be altered or explained by parol testimony. Skin. 54.

The silence of the insurance company, as to their claims against Gourdon, has lulled his creditors into a confidence, that their interests were fully secured by the two policies. They have thus by their own conduct prevented them from making another insurance, which they might lawfully have done, when the property passed into new hands. A double insurance is distinct from a re-assurance, which in England, except in the cases provided for by the stat. of 19 Geo. 2, c. 37, is absolutely void, though on the former, one loss only can be recovered. Park. Insur. 1st edit. 320. 1 Burr. 422, 496.

The letter from Pratt and Kintzing, of the 4th May 1797, was written to the defendants with no other view than to inform them of the assignments, and it must be presumed from all the circumstances, that it was sent to them, though the original cannot now be found. The application of Gourdon in December following for payment, must be supposed to be as agent for his creditors. The creditors were convened on the 10th May for the purpose of receiving information respecting Gourdon's affairs, and consulting their common interests. Hazard, the secretary of the company, was there, and as their representative was bound to give notice of their demands. He knew of the appointment of the committee, and could not be ignorant that the meditated assignment, which was completed five days afterwards, would comprehend all the surplus property, after paying the demand of Pratt and Kintzing. Ought he not then to have unequivocally asserted the claims of the corporation, and not have suffered the creditors to remain in the dark ? If a loss has been sustained by his negligence and laches, on whom, in point of equity, should it be thrown ?

It is admitted, that the payment to the United States for duties, is binding on the plaintiff, because the property in his

hands or his assignees, is subject to their lien. So of the payment to Pratt and Kintzing, on the foot of the policies. But beyond these items, and the premiums of the particular policies and the deduction of 2 per cent, the defendants insist on a defalcation of divers sums, between them and Gourdon, the first payable in June and the last in October 1797. The claim goes to the unwarrantable extent of including every charge, as well subsequent as prior to the policies in question, though none of them became due, until after both assignments were perfected. To justify a set-off, there must be a connection between the demands, and they must be in the same right. Ambl. 407. Nothing can be set-off against an assignee, which was not due at the time of assignment. 1 Dall. 28. Assignee of a bond or note can recover no more than the original obligee or payee could have done, prior to the transfer. Ib. 443. To set-off a debt against an assignee, it must be a mutual debt or demand, at the time of assignment. 3 Dall. 505. Nothing can be set off which is not due at the commencement of the suit. A plea of set-off, that the plaintiff was indebted to the defendant at the time of plea pleaded. 3 Term Rep. 186.

For the defendants, it was insisted, that it has never yet been held, that where the obligee of a bond has given promissory notes to the obligor, and afterwards assigns such bond, the notes though not due and payable at the time of the assignment, may not be defaulked against the bond, provided the same have come to maturity previous to the institution of the suit on the bond. Here all the notes precede even the first assignment though two of the charges are subsequent thereto, viz. on the 22d April and 11th July 1797. The policies, when assigned, were foundations of demands depending on the contingency of a loss. But opposed thereto are actual negotiable notes of the plaintiff's indorsed to the company, and just charges for money due to them, all of which had become due before any notice was received of the loss, and after this period, it is stipulated by the policies, that the defendants have thirty days allowed to them to pay the losses. The assignment to Pratt and Kintzing is *functus officio*, except as to 73*l.* 15*s.* 4*d.* paid to them lately by the committee of the creditors, as the balance of their demand. It does not appear that the defendants received any notice of the second assignment of the 15th May, nor when they were informed of the abandonment of the 16th November 1797.

As between the original parties, there could be no possible difficulty. The notes and charges became due and payable before the present, suits were brought. It is a settled rule, that an assignee is subject to

all the equity which existed between the first parties to the transaction. Doug. 614. And so it has been adjudged amongst us, as to bonds and notes. 1 Dall. 28. In a court of common law, the assignee of a chose in action is not considered. 7 Term Rep. 663. The committee of creditors could not support an action in their own names, not being interested originally in the policy. They therefore claim under a mere equitable assignment; and unless they can show that they have a superior equity to the defendants, the law must prevail. Whatever opinions some merchants may have formed a policy of insurance was not an instrument of such negotiable nature, as notes previous to the act of 27th February 1797, 4 St. Laws 102, and set-offs continued upon the assignment of the latter. And it will be remembered, that our defalcation act has much more comprehensive words than the British statutes. The form of the policies has been relied on, but nothing can be justly inferred therefrom. The company would have been entitled to default the premium on the particular policy, if those words had not been inserted; and the rule of *expressio unius est exclusio alterius* cannot hold in the present instance. Suppose the defendants had accommodated the plaintiff with the loan of a sum of money before he had made an assignment, or notice received of the loss, it cannot be denied but that this loan might be set off, in case of a loss, and yet no provision is made for that purpose by the words of the policy. The correct inference from the expressions would seem to be, that though the premium had not fallen due when the suit was instituted, it might be deducted notwithstanding. The application of a just subsisting debt against a counter demand may, with the utmost propriety, be deemed a payment and discharge *pro tanto*.

It is not possible that Gourdon by any assignment or other act, could extinguish the equity of the company to default their fair demands. Even in the case of a bankruptcy, a set-off obtains. The assignment of the invoices and bills of lading can produce no additional effect. It remains perfectly dubious, whether the letter of Pratt and Kintzing of the 4th May was ever sent to the company. If presumption are to be relied on, it must be supposed that Hazard attended the meeting of the creditors to announce their demand. The loss was then unknown; indeed it had not happened; and it could not be expected, that the secretary of the corporation should anticipate the event, and declare that they had a lien on the policies. At that meeting he represented the company as creditors of the insolvent trader, and if it became material to the interests of the creditors to know the true state of their demand, his presence there would necessarily put them on an inquiry.

If they have been remiss in prosecuting this object, the negligence and laches were their own, and not imputable to the defendants. It cannot be justly said, that the conduct of the company lulled the creditors into a false confidence in the policies. The schooner and cargo would naturally be regarded as pledged to Pratt and Kintzing to secure their demand, and that assignment after having performed its office, is aroused from its slumber to rob the defendants of a just demand, by a new assignment on the 7th July 1798. But the assignment of the 15th May 1797 can only affect them, and of this it does not appear they received any notice.

Shippen, C. J. delivered the charge of the court in substance as follows. The insurances, loss and abandonment have been admitted, though the time of offer of the latter to the company has not been agreed on. The notice of the assignments appears to be material in no other view, in this case, than from the inference deduced from thence, that the defendants were accessory to the loss sustained by the creditor of Gourdon. If the suits had been brought by him for his own use, the set-off would clearly obtain against him, and operate as a defence *pro tanto*, because the counter demand had actually become due before the actions were instituted; and if the insurance company have duly and fairly made their claim known, their right of set off continues against the assignees. Mr. Pratt, in his deposition, takes notice of the notes payable to the company, and says, they had not become due at the time of the assignment. But how could he have known of them, unless he had received notice thereof from the defendant? and would he not be thus apprized and put on his guard?

The law on the subject may be ascertained without much difficulty. The difficulty, if any, will depend on the facts disclosed in evidence. To ascertain the law, it will be proper to premise some considerations relating to negotiable paper, and what instruments come under that denomination.

Bills of exchange and notes payable to order in the city of Philadelphia, are properly negotiable paper, after such notes have been indorsed *bona fide* in the course of trade. The effect is, that the holder may sue in his own name, and may recover the money from the drawer without any embarrassment whatever on account of any counter demands, or want of consideration, as between the drawer or maker and payee. Bonds may be assigned by our law, so as to enable the assignee to bring an action on them in his own name, but without the other qualities

of negotiable paper, that is, if the obligor had before the assignment any just demand against the obligee, which he could have set off against him if there had been no assignment, he may set off the same against the assignee, who takes the bond subject to all the equity that it was subject to before the assignment. This rule is however subject to one qualification. If the assignee, when he is about to take the assignment, calls upon the obligor to know whether the whole money is due, if the obligor tells him it is a good bond and is entirely silent as to any claim of his against the bond, he can never after open his mouth against the demand of the assignee.

A policy of insurance is not assignable in its nature, but is assignable in equity. 2 Atky. 557. It is not like a bill of lading, which is assignable in its nature, and the assignment of which will vest the absolute property in the goods assigned to the assignee. A policy of insurance in its qualities resembles a bond for a payment of money at a future day, more than any other instrument. They are both choses in action. It is only by a particular act of assembly that the assignee may bring the action in his own name, if the assignment be sealed and delivered in the presence of two subscribing witnesses ; but the law does not present the obligor from showing a want of consideration, or setting off any counter demand against the obligee.

I have before mentioned, that it is incumbent on the assignee of a bond to call upon the obligor to know the *quantum* of the debt due. I take it to be otherwise incumbent on the assignee of a policy to call upon the underwriter and inform him before any account of a loss, and to know if he has any thing set off against the policy, in case a loss should happen. If the underwriter had this notice, and either makes no objection or claim, or is totally silent as to any claim, I should consider the assignee of the policy in the same condition as the assignee of a bond under the same circumstances, and that both are entitled to recover, notwithstanding the underwriter on the policy, or the obligor in the bond, should afterwards discover that they had a counter demand, and that their mouths are stopped by their acquiescence or silence, otherwise in both cases it would lead to a deception.

The chief question then in this case, is a question of fact, whether there was any notice given to the insurance company of the assignment, and whether they either by their acts, words or silence waived giving any intimation of their demands against the assured. We will only add that the underwriters are acquitted, unless the plaintiff or his creditors suffered by their default, in not letting their claim be shown.

The jury found for the plaintiff, but that the defendants were entitled to the defalcation.

Messrs. Rawle and Dallas, *pro quer.*

Messrs. E. Tilghman, Ingersoll and Moylan, *pro def.*

JAMES YARD *against* SARAH LEA EDWARD BURD and WILLIAM
M'ILVAINE executors of THOMAS LEA.

[S. C. 4 Dall. 95.]

The condition of an auctioneer's bond, under the act of 27th March 1790, is a security to the employers, whose property is sold at vendue.

SCIRE FACIAS. The following case was stated for the opinion of the court, and agreed to be considered as a special verdict.

On the 1st August 1791, John Chaloner, since deceased, was duly appointed and commissioned an auctioneer for the city of Philadelphia; and on the next day, he together with Leonard Dorsey, who is also since deceased, and the said Thomas Lea, who is also since deceased, as his sureties, executed a joint and several bond to Alexander James Dallas, the secretary of the commonwealth, in the penalty of 2000*l.* with a condition underwritten, that "if the said John Chaloner should well and faithfully execute the aforesaid office of auctioneer according to law, and should from time to time well and truly account for all public moneys which should come to his hands, and pay the same into the treasury of this state, agreeably to the directions of the several acts of assembly of this commonwealth, which relate to auctions and auctioneers, then the said obligation to be void, else to remain in full force and virtue."

On the 21st August 1793, while the said bond and condition were in full force, the plaintiff James Yard delivered to the said John Chaloner in his capacity of auctioneer aforesaid, certain goods, wares and merchandizes, to be by him sold, for the use and on account of the said James, which were accordingly so sold by the said John, to the amount or price of \$6,792⁵⁰/₁₀₀ and the proceeds thereof were by him received from the purchasers there (*prout* amount of sales) but the said John retained \$5,011²⁰/₁₀₀ of the money so received, and did not pay the same to the said James, and has died insolvent.

It is agreed and admitted, that the sum of _____ for duties due to the state of Pennsylvania, from the estate of the said John Chaloner as auctioneer, was recovered from the defendants, under the penalty of the said bond, and is to be deducted from it: and that if any dispute shall arise respecting the sum due to the plaintiff, under the remainder of the penalty, the same shall be settled by a jury, or by

referees appointed in the usual mode by the parties ; and in that case, the sums mentioned in this statement, shall be fully open to examination and correction.

The recovery and judgment recited in the *scire facias*, are admitted.

The question submitted to the court, is, whether the plaintiff is entitled to recover the balance in or under this suit, against the executors of the said Thomas Lea? If the court shall be of opinion in the affirmative, judgment shall be entered for the plaintiff; and if in the negative, then for the defendants.

W. Lewis, *pro quer.*

E. Tilghman, *pro def.*

The case was argued last December term, by Messrs. Lewis and Rawle for the plaintiff, and Messrs. Tilghman and Ingersoll for the defendants.

Arguments for the plaintiff. To form a correct judgment of the true meaning of the condition of the present bond, it will be necessary to take a review of the several laws, respecting auctions and auctioneers. The act of 26th November 1779, (Bayley's ed. 147. Loose Acts 267) was intended to prohibit general sales by auction, with a few exceptions. The Supreme Executive Council were empowered to appoint and commission one officer, as auctioneer of the city of Philadelphia, who was directed to give bond with two sufficient sureties in 20,000l. "conditioned for the faithful performance of the duties required of him, and for the honest and just satisfaction and payment of his employers and every one of them." This act was temporary, and declared to end with the war. Upon calculation of this penalty, at the rate of 38½ for 1, agreeably to the scale of depreciation specified in the act of 3d April 1781, (1 St. Laws 882) it will be found to amount to 519l. 9s 4d. This law was amended by an act of 23d September 1780, (St. Laws 864) whereby three auctioneers were to be appointed and licensed, one for the city, one for the Northern Liberties, and one for the district of Southwark, who were to give bond, with two sufficient sureties, in 20,000l. " for the faithful discharge of their duties, and for well and truly performing the terms and payments in and by this act directed and required." By the 3d section hereof, the auctioneers were directed to pay 1 per cent quarterly, on the amount of all the effects and property by them sold, in to the state treasury. And by the 8th section the rates of their commissions on specific articles are ascertained

and settled. Computing this penalty at 72 for 1, the result in specie will be found to be 277*l.* 15*s.* 6*d.* And it will be observed, that the duty to the state is first given by this law.

A supplement to this act passed on 13th April 1782. 2 St Laws 56. It diminished the allowance made to the auctioneers, laid an additional duty of 1 per cent. on the gross amount of their sales, and declared in the 4th section, that "the several bonds given by the auctioneers to the president, for the faithful performance of the duties of them required by the aforesaid act (of 23d September 1780) should be a security for the 1 per centum imposed by this act." In the 2d section, this proviso occurs, that "any person or persons may contract and agree with any of the said auctioneers, to pay them for their services in the premises any less reward which they may be willing to accept."

The act of 9th December 1783, 2 St. Laws 169, recites the former laws, and that the same had expired on the termination of the war, the latter acts being grafted on the act of 1779, and then makes the two last acts perpetual, except as is therein stated. It wholly drops the law of 1779.

The act of 19th March 1789, directs that an auctioneer shall be appointed for the township of Moyamensing, prescribes his duties, and the form of his bond. 2 St. Laws 680.

This was followed by "an additional supplement to the several acts of assembly, respecting public auctions and auctioneers," passed on the 27th March 1790. 2 St. Laws 777. Two additional auctioneers are hereby directed to be appointed by the Executive Council; one for the city, and one for the Northern Liberties. "They shall give bond to the president and his successors, with two or more sufficient sureties, in the sum of 2000*l.*, conditioned for the faithful discharge of their and every of their respective duties, and for well and truly performing the terms and payments in and by this act, and the several acts of general assembly, to which this is a supplement directed and required." The duties to be paid into the treasury on the sale of goods were reduced to 1 per cent.

Under this act Chaloner was appointed auctioneer and the bond given. The condition of the bond in question varies in phraseology from that prescribed by the act, but it conveys the same meaning in substance.

Finally, by the law of 26th February 1791, 3 St. Laws 9, licensed auctioneers were authorized to sell property at any place they might deem most beneficial, within the city, Southwark, the Northern Liberties or Moyamensing.

The question then is, whether the intention of the legislaure in

the law of 27th March 1790, was merely to secure the duties payable to this state, under the auctioneer's bond; or whether it did not operate as a security also, for those persons whose property was sold at public vendue? If the former is the true construction, it must be admitted to be a single case, and to differ from other bonds of public officers, as sheriffs, coroners, recorders of deeds, registers of wills, &c. and of administrators and executors. Whence could this distinction arise? By the act of 27th March 1713, section 14, all bonds given by any officers or persons in office, are declared to be for the use of, and in trust for the persons concerned, and the benefit thereof shall be extended from time to time, for the relief and advantage of the party aggrieved, by the misfeasance or non-feasance of the officers; and the 15th section prescribes the remedy by *scire facias* issued on the judgment had on the bond. 1 St. Laws 103. And the late Chief Justice in an action brought against Chaloner's executors, on the bond in question, declared, that the person who first sues, and obtains judgment on an official bond, is entitled to the preference. 3 Dall. 501 (note.) The sales at vendue by individuals were prohibited in the city; they were obliged to put them under the direction and care of an officer appointed by law. It would be unjust indeed, that the auctioneer thus licensed by the state, should give bond to secure the one hundredth part of the amount of the goods sold to the commonwealth, and that the other ninety-nine parts should be neglected and sacrificed to the general will. Besides the general necessity of auctions in large commercial cities, it is well known, that goods are frequently sold at vendue by merchants, to close the sales of adventures by their principals. If sureties are then absolutely requisite for the responsibility of the public auctioneers, they can have no reason to complain.

The condition of this bond is, that Chaloner "shall well and faithfully execute the office of auctioneer according to law;" or as mentioned in the act of 1790, "shall faithfully discharge his duties, and well and truly perform the terms and payments in and by the several acts directed and required." It was his bounden duty to collect, and honestly pay over the moneys he had received, to those whose property he had sold. Failing herein, he could not be said faithfully to execute his office or discharge his duties. Performance of the terms and payments directed and required by law, is not necessarily restricted to the 1 per cent. state duties; nor can those words be supposed to narrow down the generality of the precedent expressions.

It will however be urged, that the condition of the bond prescribed by the act of 1790, varies from that directed by the law

of 1779, and leaves out the word "employers." We admit the propriety of considering statutes made *pari materia* though expired or repealed, when we were fixing the true construction of another statute, every word of which however must have its full operation. The term duties, necessarily implies those acts, which are incident to the office, naturally and of course. The phraseology of the latter law is more extensive than that of 1779; and the revenue comes in as a secondary consideration, grafted on the commercial interests of the city. The truth is, the legislature, in 1779, practiced a dangerous experiment, by going into a minute detail of the duties of an auctioneer, as will be seen by a reference to the different sections of the law. In 1790, their expressions are general, and descend not into particulars. But it cannot be conceived, that the legislature in September 1780, had totally changed the sentiments which they had adopted in November 1779, respecting the duties of auctioneers, and made their official bonds an exception to general public bonds.

It may moreover be objected, that 2000*l.* is a very inadequate security to the employers of auctioneers, who are entrusted with property to a great amount. But was not this sum a more adequate security than the 20,000*l.* bond in November 1779, which in express terms extended to employers, and has been mentioned, was then worth only 519*l.* 9*s* 4*d.*? We cannot say, that the 20,000*l.* mentioned in the law of 23d September 1780, was continental money. Because it must be observed, that on the 31st May 1780, the operation of the tender laws was suspended for three months; on the 22d September 1780, the suspension was protracted till the end of the next session; on the 22d December 1780, it was continued with some alterations; and finally, on the 21st June 1781, the tender of all paper money was repealed. Another observation also occurs: An auctioneer is not like a sheriff, who continues in office for a certain period, unless convicted of some offence which incapacitates him. The former holds at mere will and pleasure, and may be removed on any application to the executive for misconduct in not paying over money. Hence the 2000*l.* is a more adequate security to the owners of property sold by auction, than may be pretended by our adversaries.

The arguments for the defendants traced the subject of vendue masters to a higher source. By an act of the late province, for regulating peddlers, vendues," &c. passed 14th February 1729-30, (Galloway's ed. 155. Miller's ed. 118) it is provided by the 6th section, that no persons, except as is therein excepted, shall expose to vendue any wares, &c. within the city of Philadelphia, unless he shall be first recommended by the mayor's court to the governor,

and shall have given security to the mayor of the city for the time being, for the use of the corporation, in a sum not exceeding 500l. "for his honest and due execution of the office of vendue master within the city, and for the due observation of the ordinances of the said city touching the regulating vendues, or public sales, or auctions, within the same." The construction of this condition will not reach employers. The bond was to be given to the mayor for the use of the corporation, conditioned for the due observation of the city ordinances. This act so far as it respected auctions, was repealed by an act passed on 19th June 1777. (Loose Acts 48.)

The words of the act of 1779 alone extend to employers in the condition of the bonds. If "faithful performance of the duties of an auctioneer," would include them, it was idle and superfluous in the legislature to use the subsequent words, "for the honest and just satisfaction and payment of his employers, and every one of them." It cannot be denied, that all the subsequent laws drop the term "employers," and it cannot be supposed to have been done unintentionally. Under the laws of 1779, no duties were payable to the states on sales at vendue; but the 1 per cent duty arose under that of 1780. The legislature could not possibly have forgot the act of 1779 at that time, because the very title of the law, is "an act, to alter and amend an act, entitled an act for the effectual suppression of public auctions and vendues, &c." The terms of payment in and by this act directed and required, have a clear obvious meaning, and can only be referred to this act of 1780. This act, as well as that of 1782, is only imperative on the auctioneer as to selling, not as to collection of the money. The monopoly is confined to the former act. The 3d and 4th sections of the latter act confirm this construction. The auctioneers are empowered to demand and receive the additional one per centum, and pay the same to the state treasurer, and the bonds shall be a security for the payment thereof. The proviso in the 2nd section is, that the party may agree with the auctioneers, to pay him for his services in the premises, any less reward which he may be willing to accept; the words do not run for his services aforesaid. When a factor sells goods, and the principal is announced, a payment to the factor against the will of the principal would be bad. So as to the auctions, the payment of the money might be modified by convention between the parties, and no law forbids it. If this bond take effect, it must be under the provisions of the act of 27th March 1790, whereon it is founded. If no technical exception is taken to the form of the condition, as not precisely pursuing the expressions of the law, the

words of it cannot possibly warrant a construction not supported by the law, and the question is, whether the defendants are liable in this action, under the words or spirit of the act of 1790?

It is a fixed principle in law, that as to sureties, a contract shall not be extended by construction. If the condition here had merely been "the faithful discharge of the auctioneer's duties," the plaintiff's construction that it extended to employers, might be correct, if the expressions in the act of 1779 had not occurred; but when it goes further, and speaks of "well and truly performing the terms and payments in and by this act to which it is a supplement required," the generality of the first words is confined and restrained by the subsequent expressions. The rule, *expressum facit cessare tacitum*, holds peculiarly in the present instance, when we consider that the act of 1779 expired with the war, and was never revived. There were seven auctioneers in the city and its environs, and merchants and others had the choice of them. No auctioneer could expect employment, unless he consulted the interests of his customers, and regularly paid over the money he had received. The dependence of the employers rested on the integrity and punctuality of the auctioneer, and not on the bond for 2000*l.* which was very incompetent for their security. How often do the sales of a day, or even a single hour exceed that sum? To this may be added the remark of the plaintiff's counsel, that the auctioneers well knew the tenure of their office was at mere will and pleasure, and that they could not expect to hold it, while they retained the money of others in their own hands. This reflection must naturally operate in a powerful manner on their conduct. In 1779 the trade of the city was comparatively small by reason of the war, and though we now talk of scaling the money of that day, yet* congress and other public bodies then affected to speak of the continental currency as real specie, and would not hearken to the idea of its being depreciated. We may reasonably conclude, that the law has distinguished between the auctioneer's bonds, and those of sheriffs, coroners, recorder, &c. when we find that in the latter instances, they have been declared to be in trust for the parties aggrieved, whose remedies have been prescribed by *scire facias*, and no such provisions have been made in the former. The late Chief Justice expressed no opinion, that this was an official bond, of which the employers could have the benefit.

The act of 29th September 1791, (3 St. Laws 181) exonerating

*See the circular letter of Mr. Jay as secretary of congress, unanimously agreed to by that body on 13th September 1779. Journ. Cong. 259.

the sureties of Alexander Boyd, from the payment of certain moneys found due to the commonwealth, furnishes a strong proof of temporary legislative exposition of the effect of auctioneer's bonds. There the state had recovered against Boyd 374*l.* 0*s.* 2*d.* for duties by him received as auctioneer for the northern district of the city. He obtained possession of his former bond from some of the officers of government, and produced the same to his new bondsmen cancelled, whereby a false credit was given to him, and government participated in the deception by the neglect and improper conduct of its officers, inasmuch as he was largely in arrears for duties at the time of his re-appointment; the legislature therefore, discharged the sureties from the sum recovered against Boyd, at the suit of the commonwealth. If at this period, the bond was considered as a security for the employers, by any of the departments of government, would its officers have surrendered the same, and thus sacrificed the interests of individuals protected thereby? Or would the legislature in any shape have sanctified such a measure? The sureties have remained undisturbed by individual claims since 1791.

The plaintiff in reply. Though the law of 1729-30, directs the bonds of the vendue masters to be given to the mayor of the city, for the use of the corporation, it does not follow, that the rights of individuals are excluded thereby. The bond was conditioned "for the honest and due execution of the office of vendue master," &c.

It is impossible to suppose, that the owners of goods can maintain a suit for goods sold under the auction laws in his own name. An auctioneer employed to sell the goods of a third person by auction, may maintain an action for goods sold and delivered against the buyer, though the sale was at the house of such third person, and the goods were known to be his property. 1 H. Bla. 81. In that case, the buyer had paid the auctioneer part of the amount of the goods sold, and put a receipt into his hands for a debt due to him from the owner, being the residue thereof; and it was held, that an auctioneer has a possession, coupled with an interest, in goods which he is employed to sell, not a bare custody, like a servant or shopman; though he is like a factor in some instances, in others the case is much stronger with him than with a factor. In *Willing, Morris and Swanwick v. Rowland*, in 1791, the plaintiffs sent goods to John Mease to be sold at auction; the defendant became a purchaser and claimed a demand which he had against Mease; and it was determined that the former owners could not maintain the suit. The position, that a principal may main-

tain an action for goods sold by his factor, on the custom of merchants and convenience of commerce, may be correct. The factor is the mere agent or servant of the principal, in whom the property of the goods remains. Cowp. 255. But the factor cannot be resembled to an officer appointed by law to sell goods. Here the plaintiff was prohibited from selling his own property at vendue, and could not support a suit in his own name, on a sale by the public officer. What right could he have to receive the 1 per cent for the state duty? How could the duties be collected on a great number of sales, of goods of different owners, except by the auctioneer himself? Would the receipt of any of the owners bar the state of their demand against the purchaser? The proviso in the act of 13th April 1782, does not confine the duty of the auctioneer to the mere act of selling. The duty of collecting the money is imposed on him by the 2nd section expressly; and the terms of the proviso, for his services in the premises, necessarily must relate to both acts.

Nothing solid can be inferred from the law of 29th September 1791, which can influence the question before the court. There the legislature interfered, merely as to the rights of the state, in giving relief to the sureties, for want of a Court of Chancery in a case of supposed deception. If Boyd had been indebted to his employer, under his first appointment as auctioneer, the legislature could not constitutionally have interposed. But it neither appears that he was so indebted, or that the delivery up of the bond was approved of or countenanced by any expressions in the law.

The judgment of the court was delivered in this term by Smith and Brackenridge, Justices, Shippen, Chief Justice, and Yeates, Justice, declining to take any part in the decision, on account of their connection with the defendants.

Smith, J. I will state the several acts on the subject, making such remarks on each as occur in stating it, in order that I may more briefly and clearly make the application of them, on a view of the whole connected.

He then stated in a particular manner the laws which had been cited by the plaintiffs' counsel in the beginning of their argument, and proceeded thus:

The meaning of the proviso in the 2d section of the act of 13th April 1782, is obvious. There being then so many auctioneers, and every person meaning to employ any of them, having his choice, there would be a competition of course; and where the property

to be sold was large, or where the articles were of high price, some of them might be willing to take a less commission than that the law would allow them; none of them however were obliged to take less. No argument can be deduced from this provision on the present occasion; because it is not found, nor even alleged that John Chaloner agreed to receive less than the recompence allowed by law, for his services in the premises.

It is stated, and has been admitted in the argument, that John Chaloner was appointed, and the bond in question given under the act of assembly of 27th March 1790. And the question, whether it extends to the employers of the auctioneer against his bail, the the auctioneer having made default by not paying the plaintiff the sum stated in the case, or verdict, we must now decide.

It was laid down by the last counsel in behalf of the defendants, as a general rule, that as against sureties, bonds are not to be extended beyond the letter. No authority was cited in support of the rule; but Justice Buller lays down the same rule in 2 Term Rep. 370. In strictness, the term surety in a bond is not known in law. All who bind themselves to pay are equally obligors. But what is the letter of the bond on which we are to decide? "That if the said John Chaloner should well and faithfully execute the aforesaid office of auctioneer according to law, and should from time to time, well and truly account for all public moneys which should come to his hands, and pay the same into the treasury of this state, agreeably to the directions of the several acts of assembly of this commonwealth, which relate to auctions and auctioneers, then," &c.

What are the duties of the auctioneers required by the several acts of assembly? Selling at auction, collecting the money, and paying the same without loss or waste, and paying over 1 per cent to the state. For the performance of these duties they receive their recompence. These are the terms and payments required by the act of 27th March 1790, according to which the bond in question was given, and the several acts of general assembly, to which that act was a supplement.

The meaning of the expressions, that as against sureties, bonds are not to be extended beyond the letter, is plainly this, that the surety is not liable further than the true intention and meaning of the parties, expressed in the instrument and the legal construction of the words used make him liable. But so far he is liable, and the principal is no further answerable. Both were bound to know the laws, according to which the bond was given.

There is a case, not cited by the counsel on either side, in which the liability of both is carried much further than is necessary to carry it in this instance. It is carried according to the true intent, meaning and understanding of both, beyond the strict letter of the condition by two juries, (against the bail only, and by the first jury seemingly against the opinion of the court,) by the Lord Keeper and by the House of Lords. It is *Machen and Fortune v. Stanyon*. 1 Bro. Parl. Cas. 87.

Take a view of all the offices created by the legislature of Pennsylvania, as well before as since the revolution, and we must lay it down as a general rule, that where the officer in offices created by the acts, is necessarily entrusted with the money of individuals, or to perform a duty which he alone can perform, in the due performance of which individuals are interested, the wisdom and justice of the legislature have been manifested, in prescribing that the officer shall give bond with sufficient sureties for the faithful payment of those moneys, for the faithful performance of those duties; as in the cases of sheriffs, coroners, administrators, in some instances executors though appointed by testators, recorders of deeds, registers for the probate of wills, land officers, surveyors, &c. All such bonds are declared to be, to and for the use of, and in trust for the persons concerned, and that the benefit thereof shall be extended from time to time for the relief and advantage of the party grieved by the misfeasance or nonfeasance of the officers. 1 St. Laws 103, § 14.

It has been contended, that although the sale must be made by the auctioneers, yet the owner may collect the money. The uniform practice under an act affords always a powerful help, and generally a sure guide in the exposition of it, where the words are doubtful. The uniform practice under these acts has been, that the auctioneer has collected the money and paid it over. Indeed, how could the owner of the goods, sold at auction under the law, support an action against the buyer for goods sold and delivered? It is said by the defendant's counsel that he can, because the auctioneer is his agent, and that he who sells by his agent, sells by himself, by the application of the maxim, *qui facit per alium, facit per se*. I agree, that where the principal can do an act, if he voluntarily appoints another to do that act, it is in contemplation of law done by himself. But here the plaintiff, the employer, could not do the act himself, and therefore a sale by the auctioneer is not a sale by the employer, nor could a declaration upon it, as such, be supported. Would even payment to the owner, without the order or approbation of the auctioneer, be a bar to an action brought by the auctioneer? We know in fact that the sales are made by the auctioneer in his own name, that the buyers of goods at the auction stores very

seldom know who is the owner, nor does the owner inquire who is the purchaser, and that auctioneers frequently advance moneys on goods delivered to them for sale, and therefore the argument can have no weight. 2 Stra. 1182, is a strong case to prove, that on such sale the vendee is not answerable to the owner. Should the auctioneer be considered as a factor, he is a factor acting upon a *del credere* commission, in which case the buyer can even set off any demand which he may have against the factor. 7 Term Rep. 259. 2 Bac. 124-5. (last edit.) Besides, the auctioneer alone can recover his own commissions and the one per cent duty. Will it be contended, that every purchaser of goods at vendue may be liable to two actions for the goods of every employer, one by each employer and another by the auctioneer?

By the act of 26th November 1779, only one auctioneer could be appointed, who was to give bond with security in 20,000*l.* which reduced by the scale, is not quite 520*l.* This bond was in express terms "for the payment of his employers." Each of the many auctioneers in 1790 was to give bond in 2000*l.*, conditioned as I before stated. Can it be supposed, that while the legislature increased the security near four-fold, they could mean to extinguish from 94 to 98 parts in 100 of the value of what was to be secured, and to secure only one per cent.? What! compel every person who is obliged to have his goods sold at vendue, to entrust them to an officer of their own creation, and of the appointment of the executive, over whom the employer has no control, and not oblige him to give security, contrary to uniform legislative practice? Nothing short of express words would warrant us in accusing the legislatures who passed the several acts from 1780 to 1790, (inclusive,) which have been cited, of such want of wisdom and justice, of sporting with at least 94 per cent. of the property of the needy part of their fellow citizens, and studiously securing one per cent. to the state! The law of 13th April 1782 goes very far indeed, when it declares that the bonds given by the auctioneers under the act of 23d September 1780, should be a security for the payment of the additional one per cent., imposed by the act of 1782, as before stated. I rejoice that we will not probably ever be required to decide upon this part of the act of 13th April 1782!

Although the sum in the bond given by the sole auctioneer who could be appointed by the law of 1779, to whom alone all the property sold at auction in the city was entrusted, was deemed a sufficient security; although that sum is increased now near four-fold, and the business is divided among so many auctioneers, and the owner has the choice of any of them, yet it is

contended that the sum is too small, and that it would not be a real security ; and therefore, because it is inadequate, it cannot be supposed that it extends to employers, but it must be confined to the payment of the one per cent for which alone it was adequate. It was answered at the bar, that this security was larger in proportion to the trust than that given by sheriffs. Let me add, that as every person intending to sell goods at vendue may choose which of the auctioneers he pleases, he has the additional security of the reputation which the auctioneer has acquired. Scarcely one who has occasion to send goods to a very large amount to be sold at vendue, but may be informed by his mercantile friends pretty exactly how far he may trust the auctioneer, taking into view the solvency of his sureties. Besides generally speaking, the auctioneer must pay over the money immediately after the sale of the goods ; he occasionally advances a certain proportion of the goods, as before observed. If he should by trifling, neglect or misapplication of the money, withhold payment for only a few days, the alarm is spread through the coffee-house and city immediately, and his credit becomes blasted. There is little danger that he will be again trusted, till he shall not only have made complete payment to the party complaining, but also satisfactorily account for his delay. Sheriffs, on the contrary, may frequently keep in their hands all the moneys which they have been collecting for three or four months, without legal censure : suitors may complain, but they cannot employ another sheriff on a future occasion. These observations form a full answer to the arguments urged from the supposed inadequacy of the security ; the observation of the counsel for the plaintiff, that few persons applying for the office of auctioneer could procure bail in large sums, has some weight also.

I am conscious that I listen to the arguments of counsel in every case with attention. I will not say that in this case I listened with more than usual attention. I certainly did not employ less, especially as we and the parties have been deprived of the abilities of our elder and more experienced brothers. Judges cannot even in their judicial capacities entirely divest themselves of the feelings of men. The humane mind generally sympathises with bail, who are obliged to pay for the default of the principal, without a probability, a possibility of reimbursement.

This is not only the case of bail, but the widow and orphan of that bail must pay the money. It is cause of much consolation to us, that in this case the affected parties are blessed with such affluence that they will scarcely feel the loss. But however painful to

our feelings, we would be obliged to give the same judgment, were it to draw the tear from the widow's eye, or snatch a morsel of bread from the orphan's mouth.

The case was exceedingly well argued on both sides. Every thing which legal learning, abilities and ingenuity could suggest, has been urged on the part of the defendants. In the arguments on the part of the plaintiff, equal talents were displayed, and forced conviction on my judgment. The counsel for the defendants have not, to my mind, been able to explain away or weaken the force of the plain, natural and reasonable meaning of the words upon which the plaintiff founds his claim. A full and to me, an irresistible answer has been given by the counsel for the plaintiff. My opinion therefore is that judgment be entered for the plaintiff.

If I err, I have this further consolation, that my error will be rectified in a superior court.

Brackenridge, J. The object of the first vendue law, which is of February 14th 1729-30, is stated in the act to be "to prevent sales at unreasonable times, in deceit of the buyers, and to the great annoyance of the inhabitants, by reason of the many idle and disorderly persons assembling themselves together in the night time, in the open streets, at the said vendues or public sales." By this act, bond must be given to the mayor, for the use of the corporation, for the honest and due execution of the office of vendue master, and for the due observance of the ordinances of the said city, touching the regulating vendues, or public sales, or actions within the same. Prov. Laws 155, (Gallow. edit.) Whether this bond was construed a security merely for good behavior, the holding of the vendues at reasonable times and seasonable hours, and fair dealing to the purchasers, and the due observance of the ordinances of the corporation, or whether also it enforced the doing justice to the owner of the goods sold, is a question of the same nature with that before us. "The honest and due execution," of the office of vendue master would seem to embrace it.

By the act of 26th November 1779, the auctioneer before he enters on the duties of his office, shall become bound with two sufficient sureties, conditioned "for the faithful performance of the duties required of him, and for the honest and just satisfaction and payment of his employers, and every one of them." A recompence is provided for selling, collecting the money, and paying over the same without loss or waste.

By the act of 23d September 1780, the condition of the bond to be given is "for the faithful discharge of their duties, and for

well and truly performing the terms and payments in and by this act directed." The penalty is nominally the same ; as in the former act, 20,000*l*.

By this act for the first time, a centum is reserved payable to the commonwealth. But would it be a reasonable construction to say, that the adding another obligation, or binding the auctioneer to do something more than he was bound to do before, reduced the condition of the bond, and restrained it to this additional duty of his office ? The preceding clause containing the condition of the bond has a sweeping effect, and would seem to comprehend all that was specified in the former act or contemplated therein, "the faithful discharge of their duties, and for well and truly performing the terms and payments in and by this act directed and required." It was a duty before to pay over, and would seem to remain a duty still. A fair construction of the condition would seem to be, not only a discharge of duties generally, but in particular of those added by this act.

By the act of 27th March 1790, under which the bond in question was given, the condition is in the same words as in the preceding act, and would seem to me to carry the same construction, terms and payments extending to the amount of sales for the owners ; for, in several of the acts of general assembly, to which this is a supplement, it was specified as an object. This clause would seem to me to settle it, "well and truly performing the terms and payments in and by this act, and the several acts of general assembly to which this is a supplement." All duties and obligations are embraced. Several acts to which this is a supplement, made the paying over the money to the employers expressly a duty.

The reducing the penalty of the bond from 20,000*l*. to 2000*l*. is a presumption, that the object of the security was reduced. But this presumption is rebutted and explained, by the relative value of the current medium, at the different dates of these acts.

The inadequacy of 2000*l*. specie, which in fact was more than 20,000*l*. in bills of credit at the time, to cover the amount of sales made, and secure the owners of goods, also forms a presumption, that it was not intended to cover those sales, and comprehended only the centum coming to the treasury. But this is explained by considering, that no owner is obliged to vendue his goods. The vending goods was in fact not originally favored by the law. It is a part of the preamble of the act of 26th November 1779, that "whereas the restrictions and prohibitions heretofore laid upon sales by auction or vendue, have not proved effectual ; for remedy

whereof, be it enacted," &c. Venduing was barely permitted or tolerated, under certain restrictions and regulations, but not encouraged. But if all that security is not produced for the owners of goods, which might have been by a higher penalty, it does not follow that they should be considered as having none at all. Independent of the bond, he has the additional security of the estate of the delinquent auctioneer, whatever it may be. He has the power of complaining on any delinquency to the executive authority by whom this officer is appointed, who can remove him at pleasure.

That the owner of goods can forbid payment to the auctioneer and collect himself, cannot be. The auctioneer has a lien on the goods, brought to him, not only for his commission, but for the centage to the revenue; and to separate these before collection, on a variety of articles, and to different purchasers, is impracticable.

From the necessity of the case therefore, the law would seem to give the auctioneer the power to collect the money, and as he is morally bound to pay it over to the employer, I am disposed to think him legally bound also, under the condition of the bond, and that this duty is within the express words of the obligation. "The said John Chaloner shall well and faithfully execute the said office of auctioneer according to law;" and therefore the distinction, if any exists between the principal and securities, does not come into view in this case. "To execute well and faithfully the office of auctioneer according to law" is equally comprehensive and the same in substance with the words of the act, "a faithful discharge of his duties." The penalty is small to be sure, to cover to such extent; but it would scarcely be a practicable thing to find an individual who would be willing to take the office, and could find security to a greater amount, or to an indefinite extent. It would reduce the thing to a company affair, an association which could alone be competent to a responsibility of so high a nature.

These observations mark the inclination of my mind. I shall give my opinion in favour of the plaintiff.

This judgment was afterwards affirmed on a writ of error to the High Court of Errors and Appeals, January 24th, 1804. 4 Dall. 95.

JOHN BURKE for the use of THOMAS HARRISON *against* RICHARD ALLEN.

B. mortgages land to K., and the same not being recorded in six months, sells the same land to A. and receives a bond in part payment, and then assigns over the bond informally to H. A. does not record his deed in six months, and K's mortgage is first recorded, which was the first notice either to A. or H. of the mortgage. Adjudged that the mortgage cannot be set up as a defence against the equitable assignee of the bond. Aliter, as to B. the obligee.

THIS suit was tried at bar last September term. It was debt on a bond, dated 23d April 1796, conditioned for the payment of 337l. 10s. in six several instalments, which was informally assigned to Harrison, on some day previous to the 21st January 1797, and whereon the assignee had received from the obligor 50 dollars on the 2d February, and 150 dollars on the 24th April 1797. It was given in part consideration of certain lands sold and conveyed to Allen by Burke on the same 23d April 1796, but the deed for the premises was not recorded until the 12th February 1798.

But prior to this date, on the 8th October 1795, Burke had mortgaged the premises to Elizabeth Kintzing, to secure the payment of 200l. and interest, which mortgage was recorded on the 25th January 1798.

Neither Allen nor Harrison knew of the mortgage until the recording thereof, which gave them constructive notice thereof.

It was agreed on the trial, that a verdict should pass for the plaintiff for the penalty, subject to the court's opinion, on the following reserved point: Whether the plaintiff is entitled against the defendant to recover the whole amount of the bond on which the suit is brought; or, whether the mortgage to Elizabeth Kintzing shall be deducted if less; and if the said mortgage exceeds the balance due on the said bond, whether the same is not a good defence against the plaintiff's demand? If the court's opinion shall be in favor of the plaintiff, then judgment to be entered for him; if otherwise, then a judgment of nonsuit to be entered.

The point reserved was fully argued by Messrs. Hallowell and Condry for the plaintiff, and Messrs. Ingersoll and T. Ross for the defendant, last December term.

The counsel for the plaintiff urged, that the real parties in the present suit were Harrison and Allen; Kintzing had been since called in and all the parties were now before the court as on a bill of interpleader before the chancellor. If the contest was merely between Burke and Allen, there is no doubt but the latter would prevail; but Harrison and Kintzing were equitable claimants without legal rights. An interference of interests took place upon the assignment of the bond. When Allen purchased the premises, above six months had elapsed after the date of the mortgage which was

unrecorded, and therefore being ignorant thereof he took the lands unincumbered. He had made two payments to Harrison, and thereby acknowledged the debt. Nothing *ex post facto* could revive the incumbrance. But it will be relied on, that the mortgage was entered of record eighteen days before the defendant's deed. This we contend is of no avail. The act of 28th May 1715, 1 St. Laws 112, fully provides for the cases of mortgages which remaining unrecorded for six months, are utterly void as to third persons. The act of 18th March 1775, only respects absolute conveyances, and not mortgages. Under the former possession is changed, but not under the latter. The words of the 1st section, 1 St. Laws 703, "all deeds and conveyances; &c., whereby the same may be any way affected in law or equity," &c., may be satisfied by referring them to articles of agreement. The defendant's deed is within that law, and being unrecorded for six months, would be void against subsequent deeds and mortgages without notice. This case is distinguishable from *Levinz v. Will*, 1 Dall. 434. To give the mortgage operation would materially injure an honest assignee, who is entitled to recover what appears on the face of the bond to be due at the time of the assignment. *Ib.* 28. Here Harrison expended his money on the credit of Allen, but Kintzing gave credit to Burke for two years and three months, to the detriment of innocent persons. She disregarded a duty which the law called on her to discharge, and must abide by the consequences. The claims of creditors shall not prevail against the equity of the wife, to have a settlement made on her, at least adequate to her fortune. 2 Atky. 417. Nor the assignees of the husband, he being a bankrupt. 1 Wms. 382, 459. Cox's note. But if the husband assign the fund for a valuable consideration, the assignee shall hold it discharged of the equity in favor of the wife. 2 Vern. 270. 1 Fonbla. 90.

The defendant's counsel contended, that he was entitled to default the mortgage, at the time of the bonds being assigned. 1 St. Laws 65. 1 Dall, 28. What ought not to be paid shall be considered as paid. *Ib.* 257. An assignment is in fact no more than an agreement that the assignee shall have the same benefit in the thing assigned, as the original party. The assignee must take it, subject to all its equity. Doug. 614. 10 Mod. 450. 2 Vern. 692. The assignees of a bankrupt stand in the same situation as the bankrupt where there has been no collusion. 1 Atky. 160. 2 Term Rep. 462. Though the words of the recording act of 1715, are very strong, that mortgages shall be of no effect unless recorded within six months, yet it was determined in *Lavinz v.*

Will already cited, that though not recorded in due time they may be available against the mortgagors, and their creditors. But the words of that act are. "no deed or mortgage, or defeasible deed in the nature of mortgages, shall be good or sufficient, &c. unless," &c. Now these expressions will equally include the deed to Allen, as the mortgage to Kintzing. If however the construction which has been said to have obtained of that law, should confine the clause to mortgages alone, still the act of 1775 comprehends the case of a mortgage equally as a deed, the words being "all deeds and conveyances of or concerning any lands, tenements or hereditaments, whereby the same may be any way affected in law or equity, shall be acknowledged and recorded, &c., or shall be adjudged fraudulent and void against any subsequent purchaser or mortgagee, whose deed shall be first recorded." A subsequent mortgagee is expressly named, so must necessarily a prior mortgagee be included. The deed first entered on record shall take effect, and Kintzing's deed of mortgage was first recorded. Hence the mortgage will be an incumbrance on the lands, which the defendant will be bound to satisfy. It will remain on record and effect his title materially. No earthly power can compel the mortgagee to enter satisfaction. It will be observed, that in the 3d section of the last law, there is a proviso, that the act shall not extend to any lease not exceeding 21 years, where the actual possession goes along with the lease. The exception proves the rule.

It has been asserted, that Harrison is the real plaintiff; but it cannot be pretended, that he could support the action in his own name. The declarations of a plaintiff, though only a trustee, may be given in evidence, to defeat his action. 7 Term Rep. 663-6. Burke has behaved villainously, and it is admitted that the defence would be good against him. Why not also against his assignee, to whom he can communicate no more right than he possessed himself? Which of the two innocent persons should suffer by his misconduct? The plaintiff cannot succeed at law; and the payments made by the defendant can have no effect against him, when he had no notice of the mortgage, and was ignorant of his rights. Harrison therefore has no superior equity to Kintzing. Both appear to be honest creditors. She did not record her mortgage in six months; the same default must be ascribed to Allen, as to his deed. But the first mortgage was recorded, and if the equities are equal, the law must prevail. This court will not add to the penalties prescribed by the legislature, against an innocent creditor. A deed, which is void as a commor

law conveyance, may operate as a covenant to stand seized to uses. 2 Wils. 22, 75. A defective surrender for want of presentment within 12 months, held goods against creditors and assignees. 1 Cha. Ca. 170. 2 Vern. 564. Here Harrison succeeds to all the rights of Burke, but is subjected to all the equity to which he was subject.

Curia advisare vult.

And now this term, the court proceeded to deliver their opinions *seriatim*.

Shippen, C. J. Elizabeth Kintzing, though a *bona fide* creditor, lost the surety of her mortgage, as to all other persons except Burke, and those who were *in pari delicto*, by not recording her mortgage in six months. Allen was an innocent purchaser, ignorant of the mortgage. He therefore shall not suffer by her default, who by not recording in time, put it in the power of Burke to deceive him. As to Harrison, he was an innocent assignee of Burke; and though in general an assignee stands in the shoes of the assignor, yet this appears to me one of those cases, where an assignee stands on better ground, than, the assignor. Because otherwise, he would be a sufferer, not by the roguery of Burke alone, but by the negligence of Kintzing, who now claims an equity at his expense.

As to Allen's losing the land by not recording his deed within six months, he does not by this revive the right of Kintzing, but would have subjected himself only to the claim of a subsequent purchaser, who recorded before him. Then as Kintzing could not avail herself of her mortgage as against Allen, and he must pay the amount of his bond to some body, it must be to Harrison the innocent assignee.

Yeates, J. The true construction of the recording laws, will in my idea, in a great degree, determine the point reserved, in this case.

The mortgage by John Burke to Elizabeth Kintzing is dated 8th October 1795, and was not entered on record, until 2 years, 3 months and 17 days after it was executed. The mortgaged premises were conveyed by Burke, the nominal plaintiff, to Richard Allen the defendant, on the 23d April 1796, and this deed was not entered on record, until 1 year, 9 months and 20 days had expired, being 18 days after the mortgage was recorded.

Hence it is contended, that the mortgage shall prevail, on the ground of its being first recorded. And if it is an existing le-

gal incumbrance, affecting the defendant's lands, there can be no question, as to its being entitled to be defaulted out of the present bond.

The 8th section of the law of 28th May 1715, (1 St. Laws 112) is as follows: "No deed, or mortgage, or defeasible deed in the nature of mortgages, hereafter to be made, shall be good or sufficient, to convey or pass any freehold of inheritance, or to grant any estate therein for life or years, unless such deed be acknowledged or proved and recorded, within six months after the date thereof, where such lands lie, as hereinbefore directed for other deeds."

It is objected, that the conveyance to the defendant is comprehended in this description. But it is to be observed, that the words in the nature of mortgages, run through the whole sentence, and the latter word is in the plural number; they limit and control the generality of the preceding expressions. Besides, other deeds in the close of the section, contradistinguish the objects of it, from the deeds in general provided for in the preceding parts of the law; and the uniform construction of the act, since it has passed, has been, that in this particular, it solely relates to mortgages, and defeasible deeds in their nature. It would be highly dangerous at this time, to adopt the words in a different sense, whereby many titles might be affected.

The first section of the law of 18th March 1775, (1 St. Laws 703,) enacts, that deeds and conveyances of lands, which shall not be recorded in the proper county within six months after their execution, "shall be adjudged fraudulent and void against any subsequent purchaser or mortgagee for valuable consideration, unless such deed or conveyance be recorded before the proving and recording of the deed or conveyance under which such subsequent purchaser or mortgagee shall claim. The reason of the provision is manifest, because if in consequence of the neglect of the grantee to record his deed within the time appointed, other persons have been induced to pay and expend their money ignorantly and without notice of the former conveyance, the loss should fall on the first grantee only, who has caused the same. But a prior mortgagee, who could not possibly suffer by a want of knowledge of the subsequent deed's being executed, is neither within the words nor spirit of the provision. The terms subsequent purchaser or mortgagee are repeated, and there is no appearance in any part of the act of any intention of the legislature to make any alteration of the former act, as to the invalidity of mortgages not recorded within the six months, or to revive them against subsequent *bona fide* purchasers if they were

first put on record. That act has fully provided for the case of mortgages unrecorded.

I conclude, therefore, that the mortgage to Elizabeth Kintzing does not bind the lands conveyed to Richard Allen, though it would have been effectual against John Burke himself, the mortgagor, if the same was in his hands, agreeably to the authority of *Levinz v. Will*, (1 Dall. 134,) on this plain ground, that in such case no one would be injured thereby.

I readily agree with the counsel, that if Burke was the real plaintiff, the defalcation contended for would certainly take place, and that an assignee is subject to all the equity which subsisted between the original parties. I lay no stress whatever on the circumstances of the payments of 50 dollars in February 1797, and of 150 dollars in April following, by Allen to Harrison. Such acknowledgments of the debt, or even an express promise to pay the obligation would not conclude the defendant, if made in a state of ignorance of a subsisting defence. 5 Burr. 2670. 1 Vern. 32. 1 Vez. 126, 400. 1 Fonbl. 106. 1 Espin. Ni. Pri. 174. 1 H. Bla. 64. But if Harrison had been led by the assertions or promises of Allen to take the assignment and pay his money, then the defendant would have made himself liable, because his declarations and engagements would form a new contract between him and the assignee, and he would not be permitted to injure an innocent stranger. This doctrine was laid down on full consideration, by Judge Smith and myself at Reading, at *Nisi Prius* in September 1799, between Ludwig assignee *v.* Croll, and was again asserted by Judge Smith at the sittings in Philadelphia, between Cairnes for the use of Olden *v.* Field and Harlan, and afterwards on a motion for a new trial, was assented to by the whole court, March term 1800.

In this case, I view Thomas Harrison as the true and real plaintiff, the legality and equity of whose demand is now before the court. The decisions of courts of law formerly were extremely narrow and contracted as to the assignment of choses in action; but they will now take notice of a trust, and see who is beneficially interested. And why not of an equity? says Ashurst, J. 1 Term Rep. 619; and in the elaborate argument of Mr. Justice Buller, in *Master v. Millar*, he observes that the good sense of the rule, that a chose in action cannot be assigned or granted over to another is very questionable. In early as well as modern times, it has been so explained away, that it remains at most only an objection to the form of the action, in any case. The courts of law will take notice of the assignment of choses in action, though they adhere to the formal objection, that the

action shall not be brought in the name of the assignor ; but there is no use in preserving the shadow when the substance is gone, and that it is merely a shadow is apparent from the latter cases, in which the court have taken care that it shall never work injustice. 4 Term. Rep. 340, 341.

The defendant Allen is bound to perform his contract and pay the stipulated price, but not beyond it. Whom then ought he to pay? Has Mrs. Kintzing or Mr. Harrison the superior equity, or best founded claim to the money? The former relied on the lands as her security, and at one time had a lien on them, but afterwards permitted it to slip through her fingers ; and if my ideas of the two recording acts are correct, the lands in the defendant's hands cease to be chargeable with the mortgage. She neglected to perform a duty which the law imposed upon her, and if any injurious consequences result from her laches, she only is blameable. On the other hand, Harrison purchased the bond, relying on the credit and responsibility of Allen, and is guilty of no default whatever. When he took the assignment before 21st January 1797, no incumbrances appeared on record to put him on his guard against Burke, and it is admitted that neither he nor Allen knew of the mortgage executed by Burke, until the same was recorded.

On the whole, I think the claim of Harrison much superior in point of equity to that of Kintzing, and that the money intended to be secured by the mortgage of the latter should not be deducted from the sum due on the bond.

Smith, J. I fully concur in the opinion delivered by my brother Yeates, though we have had no previous conference on the subject.

The dispute in this case, is in fact, between Thomas Harrison, to whom the bond, on which the action was brought, was equitably assigned before the 21st January 1797, and Elizabeth Kintzing, to whom the premises which Burke afterwards sold to the defendant, and for part payment of which this bond was given, had been previously mortgaged, viz., on the 8th October 1795; to secure the payment of 200*l*. Richard Allen is, or ought to be, a mere stakeholder. Is Harrison, the equitable assignee, entitled to recover under the circumstances stated, or is this mortgage a defence to the plaintiff's demand?

In equity each is entitled to the money ; for, it is not alleged that Kintzing did not lend, or that Burke was not indebted to her every farthing of the 200*l*.; nor is it alleged that Harrison did not give the full value for the bond, by Burke's being previously indebted to him or otherwise ; nor is it suggested, that he had any notice of the mort-

gage till it was recorded, which was more than a year after the bond had been assigned to him.

The act of May 1715, requires, that mortgage should be recorded in six months, or they shall not be good or sufficient to convey or pass any freehold or inheritance, or to grant any estate therein for life or years. And the act of March 1775, directs, that all deeds and conveyances, &c., for or concerning any lands, tenements, or hereditaments, or whereby the same may be in any way affected in law or equity, and not recorded in six months, shall be fraudulent and void against any subsequent purchaser or mortgagee, &c. These laws are founded in wisdom and productive of justice and security, to purchasers and mortgagees in most cases. A case may happen, in which the protection intended by them cannot reach a subsequent mortgagee, without any want of caution on his part, as the title deeds in Pennsylvania do not necessarily, and in practice, accompany mortgages. In all other instances these laws protect purchasers and mortgagees; but both may lose that protection by their own neglect. Unless Kintzing has been guilty of such neglect, in not duly recording her mortgage, the plaintiff cannot recover, because it was given prior to the sale to the defendant, and if recorded in due time it will take effect from the time of its execution.

The bond is equitably assigned; but it is a rule in law, that a bond, which is only assignable in equity, (and consequently a bond equitably assigned, or even legally assigned, as it may be in Pennsylvania) is still liable to and attended with the same equity, as if remaining with the obligee. 2 Vern. 765, 692. 1 Wms. 496. Prec. Cha. 522. 1 Equ. Ca. Abr. 45, pl. 5 10 Mod. 455. 1 Stra. 240. The rule is right, that whoever takes the assignment of a bond, being a chose in action, takes it subject to all the equity in the hands of the original obligee; but length of time and circumstances may vary that, and make the case of the assignee stronger. 1 Vez. 123, per *Ld. Hardwicke*.

It has been assumed for granted in the argument, that the mortgage would be a good defence to Allen, against a recovery by Burke. I will also suppose the same thing, by which the question will be, whether length of time and circumstances have made the case of the assignee stronger? I will state and observe upon both.

The mortgage is dated 8th October 1795, and the law required that it should be recorded in six months; but it was not recorded till 25th January 1798, just two years, three months, and seventeen days after its date. Fifteen days after the time, within which it ought to have been recorded, Burke sold the mortgaged pre-

mises to Allen, a *bona fide* purchaser without notice. Allen gave the bond in question to Burke for part of the purchase money, which was equitably assigned to Harrison, one year and four days before the mortgage was recorded. This assignment was made either in payment of a precedent debt, or for the value paid by Harrison to Burke; for it is not suggested that he purchased it at a cent under its value. I perfectly agree with the defendant's counsel, that if Harrison has not more equity than Kintzing, he cannot recover. This is one of those cases in which, from length of time and the circumstances stated, the bond so assigned became not liable to and attended with the same equity as when remaining with the obligee. The case of the assignee was thereby made stronger, and he has more equity than the mortgagee. One of them must suffer. Kintzing, by her neglect, became the instrument to enable Burke to commit the fraud. She alone must suffer by it, and not Harrison, who was in no default. By Kintzing's neglect, Harrison took the assignment; by a continuance of that neglect for 1 year and 4 days after he took it, he was lulled into perfect security. Payments were even made to him in part. Burke is able to pay, or he is not. If he is, Kintzing can recover her money from him, and if not, she, and not Harrison, ought to be the loser. Moreover, by her neglect after the assignment, Harrison was prevented from looking to Burke for the money which he had paid him for this bond. This circumstance also adds to Harrison's equity, and lessens Kintzing's.

But because the mortgage was recorded before the deed, which the defendant had also neglected to have recorded within the six months, the mortgagee is said to be yet entitled to recover, by the last clause in the 1st section of the act of 1775, and on the authority of *Levinz v. Will*. 1 Dall. 434.

The words of this act are certainly sufficiently comprehensive to include mortgages, had there not existed then the act of 1715, the 8th and 9th sections of which relate to mortgages exclusively. The 8th section declaring, that "no deed or mortgage, &c. shall be good or sufficient to convey or pass any freehold or inheritance, or to grant any estate therein for life or years, unless recorded in six months," it would be a strained construction to say, that the clause referred to in the act of 1775, extends to mortgages, and gives them an effect by implication, contrary to the express words of the act of 1715, to the injury of innocent third persons. By the 8th section of the act 1715, the recording of mortgages in six months is made a condition precedent; before the performance of it, no estate is conveyed or passed. But when this condition is performed, the mortgage takes effect by

relation from the sealing and delivery. Cro Car. 218, 449, 569. Cro Jac. 52. 1 Wils. 212. 4 Co. 71 Holt 220. 2 Inst. 674. 1 Co. 99, b. Burr. 1131, 2787, 1952, 1962. 1 Bla. Rep. 251, 605. Pow. on Dev. 600.

By the act of 1775, recording is not necessary to pass the estate. It is declared, "that it shall be adjudged fraudulent and void against any subsequent purchaser or mortgagee for a valuable consideration." As against all other persons, it is *bona fide* and valid, although never recorded; and even as against them, if it be recorded before their deeds, though after the six months. So by construction, if they had notice of it, express or implied, it is valid against subsequent purchasers or mortgagees. 1 Equ. Ca. Abr. 358. 2 Equ. Ca. Abr. 482. Cowp. 712 3 Atky. 654. 13 Vin. 550, pl. 9. 1 Vez. 64. Hargr. Co. Lit. 290, b. Ambl. 436, 624. Therefore the last clause in the first section of the act of 1775, for recording of deeds, does not apply to mortgages, not recorded within six months.

I have considered the case of *Levinz v. Will* with much attention, especially as I understood some years ago, that at least one of the bar, whose legal abilities I highly respect, had expressed dissatisfaction at the decision. I am free to own that at times my mind has been inclined to waver on the subject; but I cannot go so far as to say, that had I then been obliged to give my opinion, I would not (after hearing the strong reasoning of the late Chief Justice,) have concurred. Even if my doubts had been much stronger than they were, I would hold myself bound by the decision. But it does not reach this case. There was no innocent purchaser without notice to be affected by the neglect of the mortgagee. It does not appear that any of Levinz's creditors had trusted him on the credit of the mortgaged property, or that the neglect of the mortgagee had enabled Levinz to commit a fraud upon any person. Here, let me repeat, as one of two innocent persons must suffer, the loss ought to be borne by the person who is guilty of laches. I am therefore of opinion that judgment be entered for the plaintiff.

Brackenridge, J. All the members of the court have formed the same judgment, without communication between themselves.

When the legislature made bonds and notes assignable, and in the case of a bond with the solemnity of two witnesses, I scarcely think they had in view, that a defence could be set up against the assignee. But it has been early decided that it could be done, and we are bound by the decision. An exception has been taken to the general rule, and it has been lately decided, that where the taking an assign-

ment is contemplated by a person, an don application to the debtor, he is given to understand that the bond will be paid, a defence cannot be afterwards set up. It might have been said in this case, that the debtor in saying that the bond was good, could mean no more than that for any thing he then knew, the bond was good and would be paid, and that this admission made by him under a mistake and ignorance of what afterwards appeared, as to the consideration on which it was given, ought not to take away the equity of defence which otherwise did exist. But the point has been solemnly determined. This exception is founded on something done by the debtor before the assignment, an act of his which establishes a privity of transaction between the intended assignee and the debtor. But in the case before us, another exception is contended to be just, something not done before the assignment, which might have been done, and ought to have been done, the losing the consideration of the bond by neglect, the not recording a deed.

It would not lie in the mouth of the assignor to set up this. But an act of assembly has provided, that on the sale of real estate, it shall lie in the mouth of a purchaser without notice. There is not the same reason that it should lie in the mouth of an assignee of a bond, the consideration of which was the sale of the real estate ; for the consideration does not appear upon the bond or note. He cannot by searching offices, or inspecting records, obtain information of the validity of the writing, and that the sum on the face of it is recoverable. The debtor may say to the assignee, what have I to do with seeing you ? you took the assignment on the credit of the assignor. I am blameable for not supposing it possible that my consideration might fail by the dishonesty of the vendor, and by vigilance secured myself against it. You are blameable in not supposing it possible that the assignor might be dishonest, and made inquiry before the assignment, or secured yourself in the contract, or have had nothing to do with him at all ; there is no privity between you and me in this transaction, that your taking this assignment should put me in a worse situation than I should otherwise have been in.

These were my ideas on first thinking on the subject, but I concur with the opinions which have been delivered.

In the case before us, a second class of exceptions have been stated ; something done, or not done which ought have been done by the debtor after the assignment. On application to the debtor, he says the bond is good. This may be under a mistake and ignorance of his defence ; it can mean no more, than that for anything I know, the bond is

good. It has been so decided in the case at Reading, and even after such application, a defence was admitted against the assignee.

But payments have been made upon the bond. A bond may be payable by instalments, and the payment of the whole sum due would amount to no more than saying generally, the bond is good; but the paying of the sum due and taking time from the assignee, and inducing him to forbear, would be another matter. He is laid asleep as to the assignor, to whom his eye had been before. For though it has been decided, or collected from the decisions of this court, that a covenant does not run with the assignment, that the bond or note shall at all events be paid, so as to secure against the insolvency of the debtor; yet it does, as to the want of consideration in whole or in part, and the assignee shall in that case recur to the assignor. If he loses any advantage of recurring instantly, by the act of the debtor, it is reasonable that the debtor should lose the equity of defence against him, which he might have had against the assignor. In the case before us, payment of part was made, and the assignee seems to have forborn. On this ground I feel myself more firm, and concur in favor of the assignee. He seems to be supported by the opinion of Ld. Hardwicke, in 1 Vez. 123, that length of time and circumstances may vary the general rule, that the assignee of a chose in action takes it subject to all the original equity, and may make the case of the assignee stronger.

Judgment for the plaintiff.

ROBERT M'CLENACHAN *against* JOHN CURWIN.

The turnpike company, under the act of 9th April 1792, are not bound to make compensation for the soil, gravel or stone in the track of the road, nor to put up new fences where the road runs across the field, and the fence is thrown down: *aliter*, where it goes lengthwise along the road, or for damages done to real improvements on the track.

TRESPASS *quare clausum fregit*. The following case was stated for the opinion of the court, and agreed to be considered in the nature of a special verdict.

Under the act of assembly, passed the 9th April 1792, entitled, "An act to enable the governor of the commonwealth to incorporate a company for making an artificial road from the city of Philadelphia to Lancaster," a company was incorporated by the name, stile and title, "of the president, managers and company of the Philadelphia and Lancaster turnpike road," for the purpose of making an artificial road from the city of Philadelphia to the borough of Lancaster, which road was, under the authority of that law, laid out by the said company over the cleared,

tilled and inclosed lands of the plaintiff, situated in Chester county, and was afterwards made and completed in such a manner, as in the said act is mentioned.

And afterwards, to wit, on the first day of August 1794, the defendant, then being superintendant for the said company and acting by their commands, entered on the aforesaid land of the plaintiff, along the route or track so laid out for the said road, and for the length of 100 perches and in breadth 50 feet over and along the said route or track, dug up the cleared and inclosed land of the plaintiff, and overlaid, the same with the stones and gravel for the said road, and also then and there threw down the inclosure of fence of the said plaintiff, over and across the route or track.

No appraisement of the land so overlaid, nor of the damages done by throwing down the said inclosure, has ever been made, nor has any money ever been paid or tendered to the said plaintiff for the same; nor was his permission ever obtained for the entry upon, or overlaying the said route or track, or breaking down his said inclosure.

On the 11th July 1681, William Penn, the first proprietor of Pennsylvania, made and executed a certain instrument in writing, entitled "certain conditions or concessions agreed upon by William Penn, proprietor and governor of the province of Pennsylvania, and those who are the adventurers and purchasers in the same province." (*prout* the same instrument.) No such great roads or highways, as in the said written instrument are mentioned, were first laid out and declared to be for highways, before the dividend of acres was laid out for the purchasers; but in lieu thereof, and with the assent of the said William Penn, and the adventurers and purchasers, an allowance for such roads and highways of six acres for every hundred acres, over and beyond the said quantity of every hundred acres, was from the first settlement of Pennsylvania made by the said William Penn, in all his grants of lands in Pennsylvania, for which said allowance no price or sum of money was ever charged or paid; and a like allowance for the like purpose hath ever since been made by the successors of the said William Penn, and by the state of Pennsylvania. It is agreed, that all the acts of assembly of Pennsylvania, whether now in force or not, that either party may think material, shall be considered as a part of this case.

If upon these facts, the law shall be with the plaintiff, judgment shall be rendered for him, and a writ of inquiry of damages awarded

for him. But if the law shall be with the defendant, then the judgment shall be rendered for him.

T. Ross, *pro quer.*

W. Lewis *pro def.*

This case was argued last term by Mr. T. Ross for the plaintiff, and by Mr. Lewis for the defendant; and again this term by Mr. E. Tilghman for the plaintiff, and Mr. Ingersoll for the defendant.

The counsel for the plaintiff divided their argument into four general heads. 1. Can private property be taken for a road, without compensation? 2. Does this turnpike act impose the conditions of compensation for the soil, gravel, fencing, &c.? 3. Does the allowance of six per cent. confer a mere right of passage, or give a right of property? 4. If this allowance continues public property, and gives a right of way, is it inherent in the whole community, or can it be conferred on a few, as a company?

1. By the 1st section of Chap. 1, of the state constitution of 1776, it is declared, that all men have a natural, inherent and unalienable right of acquiring, possessing and protecting property. And by the 8th section thereof, no part of a man's property can be justly taken from him, or applied to public uses without his own consent, or that of his legal representatives. 1 St. Laws, Append. 55.

By the 10th section of the 9th article of the present state constitution, it is provided that no man's property shall be taken or applied to public use, without the consent of his representatives, and without just compensation being made. 3 St. Laws 34. These provisions, which are paramount to all laws, seem sufficient guards to individual property.

Great Britain does not enjoy a written constitution. Their parliaments have been deemed omnipotent. But even in England, if a new road is laid out, the consent of the owners of the lands through which it passes, must be had. The legislature alone can appropriate the interests of individuals to a public use, and never do it unless they make full compensation therefor. 1 Bl. Com. 139. An order of sessions for digging materials on private soil, by virtue of the turnpike act of 29 Geo. 2, c. 67, was quashed. 1 Burr. 377. A special action on the case lies for paving a street in the front of the plaintiff's house, by which the passage and lights to the house were obstructed. 3 Wils. 461. On this head, the Court is also referred to 10 Co. 141, and 12 Co. 12.

By the 6th section of the royal charter to Mr. Penn, it is pro-

vided, that the laws for regulating and governing property, shall be the same as in England, until other wise altered ; but the laws of the province shall not be repugnant, or contrary to the laws of England. 1 St. Laws, Append. 3.

The plaintiff then having an exclusive right to the 106 acres contained in his patent, granted to him by metes and bounds he has a legal as well as constitutional claim to compensation for any injury done him therein by the artificial road. His private rights have been violated, and no law can be made, which divests one citizen of his freehold and vests it in others, even with compensation. 2 Dall. 312.

2. The legislature never intended to apply individual property to public use, without a just compensation. Where a statute derogates from the rights of property, or takes away the estate of a citizen, it ought to be construed strictly. 2 Dall. 316. And no liberal construction of this law should be made in favour of the company. The 2d section of the incorporation act, (3 St. Laws 249) empowers them to purchase all such lands, as shall be necessary to them in the prosecution of their works. By the 9th section, the president, &c. may enter upon the lands, in, over, contiguous and near to which the track of the road shall pass, first giving notice of their intention to the owners, and doing as little damage thereto as possible, and repairing any breaches they make in the inclosures thereof, and making amends for any damages that may be done to any improvements thereon, by appaisement, &c., and upon tender of the appaised value, may dig, take and carry away any stone, gravel, sand or earth, there, being most conveniently situated for making or repairing the said road. The 8th section exercises the right of entry on the lands through which the road may pass ; but though the entry be lawful at first, it may by subsequent conduct unaccompanied by the acts prescribed by the law, become *tortious ab initio*. The terms in the 8th section, in, through and over, expressly relate to the tract of the road and afford a clue to the following section, where the word through is omitted. The expressions *in* and *over* are retained, and the latter must necessarily refer to the ground, through which the road passes. The company must do as little damage as possible, and repair breaches they may make in the inclosures thereof, and make amends for any damages done to any improvements thereon. They prostrate the fences at their peril, and the *essence* of the provision is, that the fields shall be re-instated with inclosures. They must repair the breaches in the fences where they can ; and where this cannot be done, by reason of the road passing through an inclosure, they must make up new fences, to secure

the grain growing from injury. The word thereon shows clearly the meaning of thereof, and points it to the route of the road. There in the close of the section includes it, as well as other lands contiguous. The company must dig the soil, in order to shape the road. It is stated here, that the road was laid out through the cleared, tilled and inclosed lands of the plaintiff. These may therefore be denominated his improvements, and amends must be made for the damages done thereto, which must include the soil itself. The act of 1700, (St. Laws 16) directs that no road shall be carried through a man's improved lands, but where there is a necessity for the same; and the value of so much of the improved lands as shall be taken up for the road, shall be paid to the owner out of the county stock. What the practice has been under this law, it is not easy to determine. It has varied much.

3. The allowance of 6 acres per cent. for highways in the proprietary grants, never gave more than a mere right of way. The right of property still continues in the owners, who having a mine on the road, may exercise their right of digging ore, leaving a passage of proper extent. But the free right of passage as contemplated by William Penn, is negatived by the company, who will suffer no one to travel the public road unless he pays for it. The reasonableness of the toll is of no moment. The question is, as to the right of imposing it. A free right of way was intended to be given to all travelers. Strangers are affected by the claims of the company; they were not bound to pay for the repairs of roads. It is idle to say, that a man possesses a right, when it is dependent on the will of another. It has always been deemed an absurd thing, when the British nation reserved to themselves the privilege of cutting logwood in Campeachy, at the end of the seven years war, that they subjected themselves to pay for the same to the Spaniards, who might therefore exact what terms they pleased.

The 6 per cent were introduced in lieu of the original concession of the proprietaries. However equal and just it might be to carve roads out of the grants originally, yet it would be highly unreasonable to do so, when large tracts are cut up into parcels; as in the vicinity of towns, where individuals have accommodated themselves with lots at a great expense. The public collectively considered, cannot be tenants in common with private persons in lands, nor can they appropriate such lands at their will and pleasure. The soil of a highway belongs to individuals; the community have only a right of way. 2 Stra. 1004.

4. But admitting, that the legislature may appropriate the surplus lands for the original purposes, they can have no preten-

sions to vest them in corporate bodies for private emolument. The present company can have no claims superior to individuals. They consulted their immediate interests when they offered to make an artificial road, and must be resembled to applicants for a private road, who are bound to pay for the land, and make amends for all damages.

It will not be pretended, that the first proprietary ever intended this allowance for roads as a fund for speculation; nor will it be denied, that he meant them to be as free as the element of air. He never contemplated an extinction of the right of the owners for private purposes, or to change the character of the original contract. If public and private interests must be combined, let it be done on the only rational principle, of making full compensation to the parties who are injured thereby. *Fiat justitia, ruat cælum.*

The counsel for the defendants, readily admitted, that private property could not, by the terms of the constitution, be taken for public uses by the legislature without compensation. Our roads do not rest on the same footing as those in England, and therefore cases from the books are perfectly inapplicable. Soon after the royal grant, the proprietary conceded that "great roads from city to city not to contain less than 40 feet in breadth, should be first laid out and declared to be for highways, before the dividend of acres be laid out for the purchasers," &c. It was soon found that these concessions could not be executed as to roads, as well as in another instance, that the proportion of lands to be laid out for every purchaser in the first city, should be 10 acres for every 500 acres purchased. The first vessel sailed from England to Pennsylvania in August 1681, and arrived in October following. It could not be then known what great towns and cities would be laid out, and hence a compliance with the concessions as to roads was rendered impracticable. It became a measure of necessity to allot the dividends of lands to the purchasers immediately; and therefore, in lieu of those concessions, as the case states, an allowance of 6 acres per cent. was made to every grantee for highways, over and above the quantity he contracted and paid for, by the assent of the proprietary, and the adventurers and purchasers. It is now too late to question the validity of this alteration; it was sanctioned by early laws; among others, by an act passed at Newcastle in 1700, (1 St. Laws, Append. 37) and another in Philadelphia in 1711, (*Ib.* 39) in the last section whereof it appears, that no rent was to be paid to the proprietary, his heirs or assigns, for the allowance 6 per cent. It necessarily follows, that every grantee holds this surplus in trust for the

community. The owners of lands have the usufructary benefit thereof, until the public interests render it necessary that they should surrender it up for its original purposes. Admit that large tracts have been subdivided ; the trust descends on every subdivision, and no person has it in his power to change the original tenure. Every purchaser is bound to know this truth ; and if it has happened in one or two solitary instances, that a larger portion than 6 per cent. has been exhausted for roads out of an original survey, it cannot be denied that the chance is far otherwise. The clause in the act of 1700, relating to improved lands being paid for out of the county stock, includes only cartways leading into the great provincial or state roads ; but the value of the latter was never at any time paid to the owner. As to lands occupied by private roads, they were to be paid for by the parties applying for and using the same. 1 St. Laws 290. It never was contended that the state held the land as tenants in common with the owners but only, that they had an undoubted right to resume the allowance granted for highways, whenever they judged it expedient for the common benefit. The powers exercised by the parliament of Great Britain, as to highways, may be seen in the statute of 37 Geo. 3, c. 78, by referring to 2 Burn's Just. 383. (14th edit.)

If the legislature by the instrumentality of viewers, can appropriate this surplus land for public roads, have they not the power of conferring the same right on a corporate body, in ease of the public treasury? The object of a good road is obtained, and none but those who make use of it, pay for making it and keeping it in repair. What difference can it make to the owners of lands, through which it passes, whether the road is made by commissioners under a public tax, or by the turnpike company? It would be strange indeed, that the public should be called upon to pay for land, originally intended as a road, for which the original owner never paid any consideration, or quit rents to the proprietaries !

Shippen, C. J. on the last argument, desired the defendant's counsel to confine themselves to the point of making up the fences, where they had been thrown down by the company, concerning which, the court had great doubts ; but on the subject of payment for the soil of the land over which the road passed, the court were perfectly satisfied.

The plaintiff has contended, that the company are not only bound to pay the owner for the right of soil, the right of passage, the stones and gravel in the track of the road, but are obliged to make new fences for him on both sides of the road, where it passes through his

old fields ! This would be more greivous to the stockholders than subjecting them to pay for the land itself, occupied as a road. For the same principle which would compel them to make new fences, must operate to keep them perpetually in repair.

The company have no hesitation in declaring, that they feel themselves bound to pay for stone, gravel and other materials in the vicinity of the route, and to repair any breaches they may make in inclosures contiguous and near thereto, and also to make amends for any damages one to any real improvements on the track of the road, such as prostrating buildings, cutting down fruit trees, &c. but they cannot consider themselves liable to put up fences, where the road goes through an inclosure, either under the spirit or words of the incorporating act. As to stone, gravel, sand or earth, found on the track of the road, they certainly are not bound to pay, if they are not compellable to pay for the land itself, being considered as public property. The word there, in the close of the 9th section, necessarily refers to the adjacent lands : for it is said, on tender of the appraised value, the company may dig, take and carry away any stone, &c. To carry away materials to be used for making the road, from the road itself, would be a strange absurdity.

The difficulty arises from the introduction of the term improvements, in the 9th section. If it had been inserted in the section preceding, no doubt could have remained, as will be seen by examining the several clauses of the act.

The 2d section gives a general capability to the company to purchase lands. They might have occasion for a greater width of ground than 50 feet, and hence the supplement of the 17th April 1795, was passed, authorizing them to purchase additional ground, where no former road had been laid out, but so as not to exceed 68 feet. 1 St. Laws, 751.

It has been properly observed by the plaintiff's counsel, that the expressions in the 8th section, afford a clue to the construction of the succeeding section. The 8th section gives a power to enter generally upon lands, &c., "in, through and over which the intended turnpike may be thought proper to pass, and to examine the ground most proper for the purpose," &c. It is not confined to the track of the road. The 9th section allows the range of the neighborhood for materials ; it drops the material word through, and introduces the additional words contiguous and near. In and over, more properly refer to the body of the land. Repairing any breaches they make in the inclosures thereof, must relate to adjacent lands. To repair, *ex vi termini*, signifies, to amend or refit. If the road crosses a field, and a few panels of fence are removed,

to affect a passage through it, the repairing the breach or re-instating the fence, would defeat the object, by preventing a passage. Making new fences cannot be said to be repairing old ones, without the utmost impropriety. To avoid this objection, our adversaries recur to what they call the essence of the provision ; that is, they change the real meaning of a word, in order to infer a conclusion not warranted by the act. If the legislature had intended the company should make new fences, in instances like the present, would they not have said so expressly, and further have described the species, whether post and rail or worm fences ? But by our assigning the words in question to the adjacent lands, a correct meaning may be given to every expression. To obtain materials, it may be necessary that the company should enter into inclosurers in the vicinity of the road ; and in such cases, they must give notice of their intention, do as little damage as possible, repair breaches which they may have made in fences, make amends for damages to improvements, and pay the appraised value of any stone, gravel, c., which they may dig, take and carry away, for making or repairing the road.

The removal of a fence on the track of the road, has been swelled into a monstrous damage. But it is not *damnum absque injuria* ? Would not the legislature and every rational person conclude, that the lands of individuals are increased in value, by a good and premanent road passing through them ? When a road of so much general importance was intended to be made for the community, every incidental power of completing it, must be supposed to be conferred on the turnpike company. Their right to dig the soil on the track, shape it and use the materials found thereon, without making payment to individuals, can scarcely be doubted. If however the court should be of opinion, that swinging-gates or any other device, which may conduce to the ease of individuals, through whose grounds the road passes, may be contrived, so as not to be deemed nuisances, or interfere with the great design of a turnpike road; the company are perfectly disposed to meet the recommendation of the court.

The form of the action appears objectionable. It is trespass *quare clausum fregit* ; but the more proper species of suit, would be a special action on the case. If the law is not unconstitutional, the defendant was justifiable in his entry on the lands by the 8th section of the act. To construe the superintendant and workmen of the company as trespassers, by entering on the track of the road, and overlaying it with stone, or throwing down a fence erected across the route, the road would be at once annihilated. But we wish a decision on the merits of the case.

Shippen, C. J. now delivered the opinion of the court ; but Yeates, J. being a stockholder in the company, took no part in the decision.

This is an action of trespass brought against the superintendant of the artificial road, leading from Philadelphia to Lancaster, called the Turnpike Road, for entering on the cleared, tilled and enclosed lands of the plaintiff, situate in the county of Chester, and digging up the said land for a certain distance, and overlaying the same along the route or track of the said road with stone and gravel, and for throwing down the inclosure or fence of the plaintiff over and across the said route or track, without having made any compensation for the said land, and for the injury done to his improvements.

The question turns partly upon the validity, and partly on the true construction of the act of assembly of the 9th April 1792, empowering the turnpike company to make this artificial road.

The validity of the act is impeached by its being repugnant to the constitution of Pennsylvania, which directs, that no man's property shall be taken for public use, without his own consent, or that of his legal representatives, nor without compensation.

To this it is answered, that the road or track of the road, running through the plaintiff's was not his separate property, for that he held it as a trustee for the public, under the grant of the late proprietaries of Pennsylvania, in which he was allowed beyond the quantity of land actually purchased and paid for, 6 per cent, for roads and highways.

— This will lead us to consider the different kinds of lawful roads and highways in Pennsylvania. There are, and have been for a great length of time, three different kinds of roads : 1st, The great provincial roads, called in the act of 1700, the “ king's highways ” or “ public roads,” which were laid out by order of the governor and council. 2d, The roads or cartways leading to such great provincial roads laid out by order of the justices of the county courts, after a return of certain viewers, that the same was necessary for the convenience of the public; such parts of these roads as run through any man's improved grounds were to be paid out of the county stock. The 3d kind were called private roads, likewise laid out by order of the county court, on the application of any persons for a road to be laid out from or to their plantations or dwelling places, to or from the highway. The improved grounds through which these roads were run, were directed to be paid for by those, at whose request, and for whose use the same were laid out.

As to the first of these roads, called in the act the king's highways or public roads, they were one of the objects of what is called concessions,

made by the first proprietor William Penn, to those original purchasers in England, by whose assistance he expected to found the colony. By this instrument, dated the 11th July 1681, it was agreed, that when the adventurers should arrive here, a certain quantity of land or ground-plat should be laid out for a large town or city, upon the river Delaware ; that every purchaser should by lot have so much land therein, as would answer to the proportion which he had bought in the country. But previously to laying the dividends for each purchaser, it was directed, that the surveyors should lay out the great roads from city to city, orto great towns, as well as the streets in such great towns or cities. The grounds to be occupied by these great roads and streets, were evidently to be out of the proprietor's lands alone. On the arrival of the adventurers in this country, it was found very practicable to lay out streets in one great city, which was accordingly done ; but quite impracticable to lay out the great roads or highways from city, to city as only one city was then contemplated. But as such great roads were to be laid out over the land of the proprietor alone, and the purchasers were not to contribute, it was at length agreed and sanctioned by the the early laws of the province, that in lieu of the impracticable plan settled in England, there should be an additional quantity of land granted to each purchaser without price or rent, to enable him to contribute without loss to such public roads as should thereafter be found necessary for the use of the inhabitants. In this plan there was evidently a chance, that the purchaser might be either a gainer or loser in the event, as it was then and would probably continue for a long time uncertain, how much of each man's land would be found necessary for such public roads. The quantity of 6 per cent. was however fixed as the permanent quantity to be added to every man's land for that purpose ; and from that early period to the present time, no grant has been made either by the proprietaries or the commonwealth, without this addition of 6 per cent. expressly for the purpose of contributing to the establishing the roads and highways. It is true, that it is not for these great roads alone, that they are to contribute, as but few of them are necessary ; but, by the law of 1700, although a compensation is directed to be made for the improved land of any person, through which the second species of roads or cartways are run, yet as to the woodland or unimproved grounds, there is no compensation to be made, evidently contemplating their liability to contribute on account of the additional 6 per cent. granted them to supply the roads and highways. Although in this early arrangement, there might be a chance that certain purchasers might

be obliged to contribute more than the 6 per cent to the roads, yet it might possibly have been foreseen, that scarce any instance of that would occur, without an equivalent likewise accruing to the purchaser, from the vicinity of such public roads to their buildings and improvements.

Even in the latter law, establishing private roads, the legislature appears to have contemplated the same liability in the purchasers to contribute the roads, the allowance to be made by those who use the road being expressly confined to the improved lands, through which such roads run, considering, that though they ought to be paid for what by their labor they had made valuable, yet, as to the land which lay in a state of nature, they were bound to contribute as much of it, as by the laws of the country, were deemed necessary for the public convenience. If then as to these inferior kinds of roads, the legislature has sanctioned the original idea, can it be doubted, that with regard to the great provincial roads, being of so much more general utility, they should be exempted from a proportionable contribution?

We cannot therefor consider the legislatures applying a certain portion of every man's land for the purposes of laying out public roads and highways, without compensation, as any infringement of the constitution; such compensation having been originally made in each purchaser's particular grant. But it is objected, that even if the legislature might do this themselves, yet they could not grant the right of doing it to individuals or a corporate body for their own emolument, so as to deprive the inhabitants or travelers, of the free use of the road, by imposing tolls, or other restrictions in the use of it. To this it may be answered, that such an artificial road, being deemed by the legislature a matter of general and public utility, and considering that it was not to be effected but at a considerable expense, and that the expense could not be defrayed, nor expected to be defrayed in the ordinary way, by the inhabitants of the several townships through which the road was to run, they devised this mode of accommodating the public with such a road at the expense of private individuals, who from a prospect of deriving some small profit to themselves, might be induced to do it; it was immaterial to the public whether it was done by a general tax to be laid on the people at once, or by the gradual payment of certain specified sums by way of toll on those who used the road only, the latter being considered as the most equal mode of defraying the charge of making and keeping such road in repair. For although every man has a right to the free use of a public road, yet every member of the community may be taxed for making that road, in any manner that the legislature may think reasonable and just.

There has been great difference of opinion at the bar, as to the 9th section of the act. I have not been without my doubts, but have at length satisfied my mind as to the construction of it. The words in, over, contiguous, and near, to the route and track of the intended road, appear to me to include both the track of the road, and the adjacent lands; and that the words repairing the breaches they make in the inclosures thereof, and making amends for any damages that may be done to any improvements thereon, likewise relate to both; but may be satisfied without obliging the company to erect new fences on each side of the road. The general breaches of inclosure would certainly be in cases, where the fences run across the intended road, and these could not be re-erected. But there might be a necessity for taking down fences that run lengthwise along the track of the road. It not having been unusual in running roads and laying out townships, in order to avoid as much as possible the doing injury to the neighborhood, to run the roads in the line of two neighboring tracts, the legislature might reasonably suppose such instances might occur in opening this road; and it was therefor proper to oblige the company, to re-erect the fences by the side of the road. The word repairing seems not to carry the idea of new erections, but restoring what had been prostrated.

In opening other roads, public and private of any length, it could scarcely be avoided in many instances to lay open to inclosures; but it has never been contended, that either the county or private petitioners were obliged to repair them, by erecting new fences on the sides of the roads. The members of the legislature must have known this, and would therefore if they had meant it in this case, have provided for it in express words. The truth is, that it has been considered, that the running of a road through a man's land confers such a benefit on him, as fully compensates him generally, for the expense of fencing his land anew.

I observed before, that the words in, over, contiguous and near, to the track of the road, extended as well to the road itself, as to the adjacent ground from whence the materials were to be procured, and to the damage done to the inclosure; so likewise I consider it to extend to both, as to making amends for any damages done to the improvements thereon. And it has in any case been found necessary to pull down houses, destroy orchards, or spoil grain in the track or route of the road, the company are undoubtedly bound to make compensation to

the owners, as well as the adjacent grounds from whence they are to collect the materials. In the present case no such damage is found. And on the whole case, it is our unanimous opinion, that judgment should be entered for the defendant.

Brackenridge, J. subjoined, that it ever had been his decided opinion, that in all cases of roads laid out by order of the county courts, where they had been carried through a man's improved lands, the soil of the land was not to be valued and paid for either by the county or the petitioners, but merely the improvements. This appeared clear to him *ex vi termini*; and no valuation is to be made of woodland.

LOUIS CROUSILLAT *against* JOSEPH BALL.

[S. C. 4 Dall. 294.]

Letter from a captain to his owner cannot be received on the part of the owner as proof of property shipped, without invoices or bills of lading.

Captain's protest is evidence on a policy of insurance.

A broker on effecting a policy, is agent of both parties and notice of an abandonment to him is sufficient to charge the insurer.

As between insurer and insured, the decree of a foreign court of Admiralty is conclusive only, where warrantees are inserted in the policies.

Policies in time of peace continue though a war breaks out; but the insured must not do any thing which will add to the risk of the insurer.

On *narr.* stating a loss by capture, there can be no recovery on the barratry of the master; and where in a special verdict the jury have found certain misconduct of the master the court will not infer that the risk of the insurer was increased thereby.

THIS was an action on a policy of insurance, dated 29th December 1792, on goods on board the brigantine Sophia, George Price, master, from Philadelphia to New Orleans, and from thence back to Philadelphia, with liberty to touch and trade both on her outward and homeward passages at one port in Hispaniola, upon all lawful goods and merchandize loaden or to be loaden; warranted free from any charge, damage or loss which may arise in consequence of a seizure or detention of the property for or on account of illicit or prohibited trade. The defendant underwrote 200*l.* on the policy at a premium of 12*l.* The declaration stated a loss by capture.

It appeared on the trial in December term last, that the plaintiff was the owner of the vessel, and had property on board to the amount of the sums insured. The captain was consignee of the cargo to New Orleans and Port au Prince. The policy was subscribed in the time of peace, but France declared war against Great Britain on the 1st February 1793. The captain received on board divers quantities of West India produce from French inhabitants of St. Domingo, which had false marks, being generally marked L. C., and covered them as American property. He cleared out at Port au Prince on the 18th June 1793, and next day was captured by a British privateer schooner called the Little Ann, and carried into Jamaica, where on the 11th

July following, the brig and cargo were libelled as prize, as belonging to Frenchmen, or persons residing in the territories of France. The captain filed a claim for his owner. On the preparatory proofs in the Admiralty, he swore, that all the cargo belonged either to the plaintiff or himself, except 8 barrels of coffee, and that he had signed no bills of landing for the cargo. He gave no account of his sales at New Orleans or St. Domingo, or any proof of the property bought for his owner; nor were any invoices or bills of landing at either place produced. He afterwards made a second oath, differing from his former, and attempting to explain what he had at first asserted. After the brig was brought into port, three bags of papers were found secreted in her run, and several bills of lading signed by the captain were discovered. The judge on the 6th November 1793, pronounced his definitive decree, as follows: "That the several goods, wares and merchandize, slaves and effects, libelled against in this cause taken, &c. were and are good and lawful prize, and that the said goods, &c. be confiscated and condemned to our sovereign lord, the king, to the use of the commander, his owners, officers, seamen and mariners, of, &c. relators in this cause, and that the same be sold, &c. That the said George Price, as the claimant of the several goods, &c. condemned as aforesaid, or of the greatest part thereof, be condemned in the costs of the said relators, occasioned by the said claim. That the said brig be and is thereby acquitted and discharged from the seizure thereof; and that the same be restored to the said George Price, the claimant thereof, on behalf of the said Louis Crousillat. And it appearing from the examinations taken in the cause, and from the bills of lading and other papers lodged in manner aforesaid, that the said George Price, in his conduct as master of the said brig and as a neutral subject, had not observed a fair and proper neutrality in carrying the said cargo, that he or the said Louis, as owner, was not entitled to any freight for the goods, &c. condemned as aforesaid, and therefore the same was disallowed."

From this decree an appeal was entered.

On the 27th January 1794, the plaintiff sent a letter to John Taylor, the broker, at whose office the insurance was effected, desiring him to inform the underwriters of his abandonment of the cargo, and referring him to the captain's protest and copy of the admiralty proceedings in Jamaica. It did not appear expressly that the defendant received notice hereof, but he and the other underwriters had a meeting shortly

after on the subject of the loss. The insurers having thirty days to pay in case of a loss, by the terms of the policy, gave no answer on being notified of the protest and cession, as was proved to be customary in such cases; and the plaintiff prosecuted his appeal in Great Britain without consulting them, where on the 9th December 1894, the decree of the admiralty court was affirmed by the Lords Commissioners of Appeal, except as to the costs, which were remitted.

The present suit was brought to March term 1796.

A question of evidence arose on the trial. Certain letters received by the plaintiff from his captain, dated at New Orleans and Port au Prince, were offered in evidence to show in what manner the cargo had been shipped, and by whom the particulars were owned. The defendant's counsel objected that the captain was the plaintiff's immediate agent and consignee at both places. It was not a mercantile case, wherein there should be a relaxation of the strict rules of law, on any ground of presumed necessity. He ought to have been examined upon a commission, and have shown his invoices and bills of lading. The plaintiff answered, that the captain had subscribed no bills of lading, but that his letters were substantially the same thing, his signature being verified. A bill of lading, with the captain's oath that the articles were on board, are proof of interest. 1 Espin. Rep. 373. Property in a cargo proved by a bill of parcels from abroad, and a receipt thereon, the hand-writing being proved. 2 Stra. 1127. But the court ruled that the letters could not be received in evidence without the utmost danger. Invoices and bills of lading are the usual modes of proving property, of which no seaman is ignorant, though they are not exclusively so. As well might the letters of the owner himself be produced to prove the property in the goods shipped, as those of his agent and consignee. We go further than the courts of Westminster Hall, in allowing the captain's protest to be received in evidence in all cases of insurance. But in England it is refused, unless under certain special circumstances in late cases. 7 Term Rep. 158. 2 Espin. Rep. 490.

It was also contended, that notice of the abandonment to the broker did not charge the underwriter, unless it was traced to him also. The defendant urged that the broker was the agent of the assured, being employed by him. Lex Mercat. Red. 456. Wesk 65, § 8. The local circumstances of both countries do not disagree in this particular. If the broker omits to do his duty, he and not the insurer is responsible. [An eminent insurance broker was examined to this point, who also asserted, that though by the silence of the insurer, on receiving notice of the abandonment, he accedes thereto, yet he does not thereby empower the assured to proceed on the appeal; and if the latter goes on

without the authority of the former, it is at his own risk. But another broker of considerable experience was of opinion that the assured generally went on with their appeals, on receiving no answer from the insurer, and the assured were deemed bound to prosecute their appeals in proper cases.] The offer of the cession made and not agreed to, might be relinquished by the insured, when he prosecuted his appeal. To prosecute it without the concurrence of the underwriters, and yet charge them with the costs, is highly absurd. If the abandonment is accepted, the insured have nothing further to do with the property. If otherwise, they may elect either to proceed against the underwriters, or prosecute their appeal. The clause to labor, &c. in the policy, relates only to acts done before abandonment. The acts of the captain shall not prejudice the right of abandonment. 1 Term Rep. 608.

On the other hand it was insisted, that though the broker was originally applied to by the insured, yet in the progress of the business, he becomes the agent of both parties. This is the general idea, and one striking circumstance proves it, that in insurances of property no one ever counted on the accountability of the broker. Whether an agreement be made by the parties personally, or by a broker mutually employed, it is equally binding. 1 Dall. 420. In the Supreme Court of the United States, *Duncan v. Coates*, Judge Chase held that a verbal notice of abandonment to an insurance broker was sufficient. Demanding payment as for a total loss is equivalent to abandonment; said by the counsel on one side and not denied by the other or the court. 8 Term Rep. 273. But the plaintiff is under no necessity of relying on this point, since notice to the defendant himself of the abandonment may fairly be inferred from his meeting the other underwriters, to consult on the loss, immediately after the date of the letter of the 27th January 1794. A relinquishment of the abandonment will not be implied against the express declared intention of the party in the act of cession.

The court were of opinion, that though the broker in the first instance might with the strictest propriety be deemed the agent of the party employing him, yet when the policy is affected, he necessarily becomes the agent of both parties. He receives the premium for the underwriters, and settles the proportional quotas in case of a loss. In the reason of the thing, founded on common experience, a notice of abandonment to him must be sufficient. The costs of the appeal may be involved in the other point, about which the the brokers have dis-

agreed, but the relinquishment of the abandonment cannot be implied under the circumstances of this case.

It was urged as a ground of defence, that the decrees of the admiralty courts in Jamaica and Great Britain precluded the plaintiff from recovery. The sentence of a court of admiralty, binds all the world as to every thing contained in it. Where the condemnation goes upon the ground that the vessel was not neutral, it is conclusive evidence. Parke, 403. (1st edit.) This fully appears from the cases of *Barzillay v. Lewis*, cited *Ib.* 410, and *Saloucci v. Woodmass*. *Ib.* 413. Wherever the sentence is general and no special ground is stated, it will be conclusive and binding, and other courts will not assume the office of reviewing the proceedings of a forum, having competent jurisdiction of the subject matter. *Ib.* 417. Where property has been condemned as lawful prize, without expressing a ground, it will refer to the libel. Prizes are acquisitions *jure belli*. Doug. 585, 591. And in the Supreme Court of the United States, in February term 1800, *Vasse v. Tingey*, Judge Washington observed, that prize was property taken from an enemy *jure belli*. Here the decree condemns the cargo, either as wholly belonging to French citizens, enemies of Britain, or that a part of it being clearly ascertained to be French, and blended with other property about which there was no credible proof, and the captain having grossly perjured himself in material facts with a design to disguise and conceal the truth, the judge found it out of his power to discriminate, and condemned the whole in one mass. There is nothing dubious in the sentence. It rests not on foreign ordinances, contravening the law of nations. It ascertains that the cargo belonged to the enemies of Great Britain, whereas the plaintiff's property was insured as American. Of what moment then can it be, that there is no warranty that it was American property? It was represented as such, and by the sentence in the admiralty, it is found to be otherwise, to which implicit credit is to be given. The case of *Christie v. Secretan*, 8 Term Rep. 192, will be cited against us. The point there determined, was that an American vessel, which the broker refused to warrant, having all the documents on board required by the treaty between France and America, but not having the Roll d, Equipage required by the French ordinance, and being afterwards condemned in Nantes, the insured had a right to recover.

The plaintiff answered, that the ground of condemnation did not expressly appear by the sentence, and therefore he was not concluded thereby. All the decisions settle a material difference between policies with, and without a warranty. Whatever solidity there may be in the distinction, considered upon principle, it certainly has obtained ;

and in all the cases wherein the decrees of foreign courts of admiralty have precluded the insured from recovery, there have uniformly been warranties. Lord Chief Justice Kenyon asserts this to be the law in the case cited. 8 Term Rep. 196. And where a loss has been proved by the insured, the burthen is thrown on the insurer, to show why he should not be responsible for the loss. *Ib.* 197. Per Grosse, Just. And of this opinion was the court.

The defendant's counsel admitted, that a policy subscribed in time of peace, continued binding though a war should break out ; but further insisted, that there was an express warranty against illicit or prohibited trade, and the brig had notwithstanding been engaged in such trade. Contraband articles affect innocent parts of the cargo, belonging to the same person. 1 Robins. Admty. Cas. 26. The vessel will even be forfeited thereby. *Ib.* 165. Where papers are suppressed, it must be considered as a proof of *mala fides* ; and where that appears, it is an univesal rule, to presume the worst against those who are convicted of it. *Ib.* 113. In prize courts, the rule of *falsus in uno falsus in omnibus*, is a rule of unexceptionable justice. *Ib.* 213. Transporting enemy's property under false papers and a false mask, is cause of confiscation. *Ib.* 135. The master is the agent of the owner of the vessel, and can bind him by his contract or his misconduct. 2 Rob. 70, 71, 127, 131.

When it is generally said, that in case of a war breaking out, the insurers must bear the risk, this restriction must naturally exist, that the insured must conduct themselves by the strict rules of neutrality. So every ship insured, must at the time of the insurance, be able to preform the voyage, unless some external accident should happen. Parke, 249. 5 Burr. 2804. Every neutral vessel should have all the papers necessary to show her neutrality. If she has them not on board, the underwriters will be excused. 8 Term Rep. 197. The ship must not forfeit her neutrality by the conduct of any one on board. *Ib.* 230. The insured must prosecute the voyage in the policy without doing any thing to the prejudice of the insurer, so as to increase his risk. Ought the master to have accepted on freight, the goods of the French citizens of St. Domingo, disguised as American property, under false marks ? Ought he not candidly to have declared on his capture, the true state of the property on board, instead of concealing his papers, and adding to his former weakness the crime of perjury ? The risk to the insurers, is as much increased by this improper conduct, as if he had hired his vessel to one of the belligerent powers, or entered a harbour, while in a state of blockade.

The plaintiff's counsel observed, that the policy respected a certain species of illegal trade ; a smuggling voyage to a French and Spanish island, was contemplated and mutually understood by both parties. The illicit or prohibited trade in the policy, applies to a violation of of the revenue laws. The homeward cargo, consisted of West India produce, and not the contraband articles' referred to in Dr. Robinson's reports. The decree in the admiralty does not express the prohibited trade as the ground of condemnation; if it had been considered as such, we should have been sure to have heard of it, from a British West India judge. It is admitted, that the conduct of Captain Price is highly reprehensible, and that he has gone much too far to assist the interests of his owner. Still he was not totally to be disbelieved. But if he was even guilty of corrupt perjury, it will not convert the property of the plaintiff into French property, so as to influence the decision of the present cause. The risk of future war is taken by the underwriter in every policy. Dougl. 708. Throwing papers overboard, is a strong ground of suspicion, but of itself, is not a sufficient ground of condemnation, says Lord Mansfield. Dougl. 560. And Per Buller, Just. The willful throwing of papers overboard, is only presumptive evidence of enemy's property. *Ib.* But in what particular, has the captain broke the rules of neutrality? Where is the warranty for his neutrality?—The policy was subscribed in a state of peace.—If the goods of a belligerent are openly taken on board a neutral vessel, this is no breach of neutrality ; the property when captured by the enemy, is liable to condemnation, but the owner will be entitled to his freight. If the property was attempted to be covered, the freight would be lost ; but in neither case, would it be a ground of condemnation of other goods belonging to other persons, nor would the underwriters in either case be discharged. The true question is, had not the plaintiff property on board, to the amount of the sum insured? Of this the jury have had abundant proof ; and if a loss has happened in the course of the voyage insured, the plaintiff is entitled to a recovery, within the terms of the policy.

After the counsel had fully spoken to the cause, Shippen, C. J. delivered the charge of the court to the jury, substantially as follows :

It is a settled principle, that policies of insurance shall always be construed according to the intention of the contracting parties, and not according to the strict and literal meaning of the words. Parke 33. They shall be taken largely for the benefit of trade, and for the insured,

and the usage of trade may be called in to explain any doubts. *Id.* 44. 1 Burr. 348. Insurances made in time of peace continue, though a war should break out ; but it would be inequitable that the insured should do any thing in the voyage insured, which should add to the risk of the insurer. The latter runs sufficient risks in the event of a war, without being subjected to new chances. The case of deviation may be fairly brought in by way of analogy. If there is a voluntary departure without necessity, or any reasonable cause, from the regular and usual course of the specific voyage insured, the underwriters are discharged from any responsibility. Nor is it at all material, whether the loss be or be not an actual consequence of the deviation ; for the insurers are in no case answerable for a subsequent loss, in whatever place it happen, or to whatever cause it may be attributed. Neither does it make any difference, whether the insured was or was not consenting to the deviation. Parke 335, 336. It seems here, that a smuggling voyage to a French island, was mutually understood to be insured. The captain was the agent and immediate consignee of the cargoes at New Orleans and Port au Prince. On a war breaking out between Great Britain and France, he might perhaps have taken French property on board at the latter port, but he ought not to have masked it as American property, under the false marks of the initials of his owner's name. He should have transacted business in the ordinary mode by signing bills of lading, and having regular invoices of the shipment made for his owner. Whether the West India admiralty judge and the Court of Appeals have given correct sentences or not, it is not our province to determine ; but certainly, when it appears that enemy's property has been covered by false marks to a considerable extent, no invoices or other documents to ascertain the plaintiff's interest produced, papers proved to have been privately concealed, and the captain and consignee have been guilty of willful false swearing, the mind of every reasonable man will be affected by such testimony. The judge must see this mass of circumstances in the same light in which it would strike the common understandings of mankind. We think in the nature of the thing, that the risk of the insurers must be increased by such conduct of the agent of the insured, and against which the former never undertook to indemnify for the premium which they received. Whether such conduct of the captain increased the risk or not, is a matter proper for the consideration of the jury ; and their verdict must depend on the result of their deliberations on this question.

The jury after staying out a considerable time, declared they could not agree on a general verdict. At length they found the following special verdict: "That Louis Crousillat, the plaintiff, caused the insurance to be made as laid in the declaration; that he had property on board the brig Sophia therein mentioned, to the amount insured; that the defendant subscribed the policy (*prout* policy;) that the said brig was captured and carried into Kingston, (Jam.) by a British privateer, where she was libelled, as stated in the copy of the record of the proceedings of the Court of Vice Admiralty (*prout* copy of record) and finally condemned (*prout* decree;) that George Price, the captain of the said vessel, and consignee of the plaintiff's property on board the same, in the course of the proceedings in the Court of Vice Admiralty, was guilty of perjury (*prout* depositions; that there were false marks on goods on board the said Sophia, when so captured, differing from the oath made by the said George Price, and also that papers were concealed on board the said brig Sophia; that the plaintiff abandoned to the defendant, and claimed for a total loss in due time; and that this suit was commenced in due time, after the expiration of the time mentioned in the policy; and if upon the whole the court shall be of opinion that the law is in favor of the plaintiff, the jury find for the plaintiff and assess damages at \$1024 $\frac{86}{100}$; but, if in favor of the defendant, then they find for the defendant."

To this special verdict an agreement was subjoined, subscribed by the counsel, that notwithstanding the special verdict in this cause refers to the decree of condemnation, that decree is not to be considered, nor contended for by the defendant, as conclusive on the plaintiff.

The special verdict came on to be argued this term.

The plaintiff's counsel urged, that the captain was not consignee of the return cargo, nor was it intended to convey that idea by the special verdict. What Price did was of his own head and not in pursuance of the plaintiff's directions; nor does it appear that the conduct of the captain was the ground of condemnation, but the cargo was condemned as French property. The captain appears to have committed barratry, and the defendant is thereby chargeable. Any act of the master or of the mariners, which is of a criminal nature, or which is grossly negligent, tending to their own benefit, to the prejudice of the owners of the ship, without their consent or privity, is barratry. Parke 94. 2 Ld.

Ray. 1349. 1 Stra. 581. 2 Stra. 1173. Cowp. 143. 1 Term Rep. 323. 4 Term Rep. 33. 7 Term Rep. 506, 508.

Here then are all the ingredients found which constitute barratry. The Captain must have sworn falsely to derive a benefit therefrom to himself. He claimed part of the property on board. He was entitled to his customary average and dues. Taking of a prize against the owner's instructions, is barratry. So of any act which increases the risk. 6 Term Rep. 379, 383. 1 Espin. Ni. Pri. Rep. 339. Though it must be owned, fraud must exist in such cases. 7 Term Rep. 505, 508. The interest of the master is an ingredient in barratry, only so far as it shows fraud in him, but is not an essential circumstance. Though he may conceive his acts to be for the benefit of his owner, yet if they be fraudulent, it is barratry notwithstanding. Thus resistance to an embargo lawfully laid, is an act of barratry. 1 Term Rep. 127. We know that the case of *Elton v. Brockden*, 2 Stra. 1264, will be cited against us. It professes to say, that the mariners forcing the master to go out of the course of the voyage, and running away with the ship under the circumstances of that case, did not amount to barratry, because not done to defraud the owners. Lord Mansfield thought that case imperfectly reported. Cowp. 154. No decision can be shown, where on an act in the master criminal in itself, an interest in the owners is necessary.

The counsel for the defendant contented themselves with observing in answer, that if the plaintiff founded his expectations of recovery on the barratry of his master, he should have declared accordingly. Here the loss is stated by capture. The plaintiff must bring his loss within one of the perils insured against by the policy, but he must always state it according to the truth; as by capture, fire, detention, barratry, &c. Parke 455. In Cowp. 743, there was a count for barratry. So in *Hood v. Nesbit*, 2 Dall. 137. And in 8 Term Rep. 234, it is taken for granted, that the barratry must be laid in the declaration.

The court said, nothing could be clearer, than that the averment of the loss was a most material part of the declaration. If it is not laid truly, or can be shifted from a capture to a barratry, the defendant could never come prepared to answer it. If even the facts were more specially found, as in *Hood's executors v. Nesbit*, 2 Dall. 137, we could not take them up as barratry, on the present record.

The plaintiff's counsel then said, they would take up the ar-

gument next day, on other grounds, if the court would indulge them with a postponement.

This being granted, they contended, that in determining on the special verdict, the court must necessarily judge either from the matter charged in the libel, and found in the sentence, or from a lawful cause of condemnation by the general law of nations. Every court of judicature will be presumed to have acted rightly. On the latter ground, no cause appears; because the concealment of papers or throwing them overboard, of themselves merely, are not sufficient to condemn, though they amount to suspicion and presumption of enemy's property. Doug. 560. 1 Coll. Jurid. 185, (case of the Silesia loan.) Nor is it any where asserted, that the brig was pursuing a prohibited trade, not allowed before the war.

The libel charges the property to be French, and the decree affirms the charge. This was much insisted on by the defendant's counsel at the trial, and that there was nothing dubious in the sentence of the judge. But the inference then deduced, was, that the sentence being conclusive on the whole world while it remained in force, the plaintiff was precluded thereby from showing his property insured on board.

This event however overruled them upon that point, and the jury have expressly found the plaintiff's property. The libel charges no breach of neutrality, but the sentence states it as the reason of not allowing the freight. The captain's perjury arises as to the ownership of the goods, the marks on parts of them, the bills of lading and the concealment of the papers. But none of these are stated as the grounds of condemnation, whatever effect they might have produced in the mind of the judge. This court cannot substitute conjectural causes of condemnation, which are not mentioned by the judge. They can draw no inferences from the facts set forth in the special verdict, but are confined to the finding. The jury alone could draw those inferences. Wherever the condemnation goes on a special ground, it ought to be stated. 8 Term Rep. 230. Otherwise it shall be taken to have been on the ground of enemy's property. *Ib.* 234. The present case is distinguishable from a deviation, which had an effect on the minds of the court in their charge. There, when the course of the voyage is changed, the act is consummate, the condition is broken, and the policy is determined. So going into a besieged port, and trading with the enemy, this conduct *ipso facto* discharges the underwriters. But where a neutral vessel passes a blockaded port, or resists forcibly a search at sea, and at a future time is captured and con-

demned as enemy's property, the former conduct will not absolve the insurer. The plaintiff's property, insurance and loss have been proved. He was not privy to the acts of the captain nor assented thereto. He has declared on a loss by capture, according to the truth of the case; and if he had declared on the barratry of the master, he would have been defeated by a production of the admiralty proceedings. It was answered by the defendant's counsel, that sufficient matter does not appear on this special verdict, to entitle the plaintiff to judgment. Yesterday it was said, every thing was criminal and fraudulent as to the captain; now he ceases to be a barrator, his conduct is softened and almost venial, and could have little effect on the mind of the judge. If the false marks on the goods, concealment of papers, and perjury of the master, did not produce the condemnation of the whole cargo, we must seek in vain for the grounds of the decree. A part of the property was ascertained to be French from the secreted papers and bills of lading afterwards discovered, but this referred immediately to such part of the cargo only. The sentence must necessarily be founded on the collected mass of suspicious circumstances exhibited in the cause; and it is submitted to the court, whether they may not fairly infer this from the whole of the admiralty proceedings. If they can, then the analogy between this case and deviation, strongly holds, the risk of the underwriter being increased by the conduct of the captain, and the policy having contemplated no such additional risk. In an indictment for a capital offence, the jury found a special verdict, that the defendant encouraged and abetted, &c., and the court held it tantamount to aiding and assisting. 4 Burr. 2081. They inferred it as a necessary consequence of the act found. So in 2 Lord Ray. 1490, they inferred malice from the facts found in a special verdict on an indictment for murder in the case of Major Oney.

By the court. The word abetting, made the party a principal in the second degree. 4 Burr. 2082. And it is the province of the court to determine what acts afford proof of malice. Burr. 396, 474, 937. 3 Term Rep. 428. But it is clearly settled that we are confined to the facts found in a special verdict, and cannot supply the want thereof, by any argument, or implication from what is expressly found. 2 Haw. c. 47, § 9. Is it possible for this court to infer that the conduct of captain Price increased the risk of the insurer, (though our private judgments may be fully satisfied on that point) when it has been submitted as a fact proper for the jury's consideration, and they could not agree in their conclusion after repeated efforts? No judgment

can be rendered on this verdict, and therefore a *venire facias denovo* is awarded. .

Messrs. Tilghman, Dallas and Du Ponceau, *pro quer.*

Messrs. Ingersoll and Rawle, *pro def.*

JOHN DAVIS and RICHARD MARIS *against* JAMES CUMMINS.

Privilege of a suitor does not hold, when he has been surrendered by his bail in another cause, and is in actual custody at the time of arrest.

MOTION to discharge the defendant from an arrest on the following affidavit by him made :

That he came to Philadelphia on the 14th March instant from Northumberland county, for the purpose of attending the Supreme Court as a suitor, in a cause against him by Cochran and Thursby, now pending in the said court ; that on the next day he was taken on a bail piece in a suit wherein John Plankinhorn is plaintiff, and on the day following, being in custody, a *capias* was served on him at the suit of Smith and Maris, and held to bail in 2500 dollars, in consequence of which he is deprived of the means and apportunities of attending to the cause of cochran and Thursby, the decision whereof will be of great consequence to him.

It appeared that the cause of Cochran and Thursby had not been put on the trial list, and that the special bail had informed the defendant, unless he came down on the day fixed for that purpose, his appearance would be compelled, in order to discharge the bail from his recognizance.

Mr. M'Kean for the plaintiffs, objected that the defendant's appearance was voluntary in discharge of his bail, and besides there was no necessity for his attendance at the court, when the suit of Cochran *v.* Thursby had not been put on the trial list. The privilege of suitors only holds where there is *bona fide* attendance on the trial of the issue. Besides it is a general rule, that there can be no privilege against privilege. 1 Tidd's Pract. 76. An attorney has no privilege where he is in the actual custody of the marshal. *Ib.* 77. Carth. 377. 1 Salk. 1, 2. 1 Ld. Raym. 135. 12 Mod. 102, 112, 535. 1 Stra. 191.

It was answered by Messrs. D. Smith and Cooper for the defendant, that the law did not enjoin that the cases of the privileges of suitors should depend on their attendance on the cause alone, though it is agreed that the attendance must be *bona fide* and not colourable.

Here the party could not know that his action was not marked for trial, but had reason to believe it was, and attended accordingly. His exemption from process is the privilege of the Court. 2 Bl. Rep. 1193. Annal. 41. The case of *Bands v. Bodinner*, cited by Mr. Tidd, from several books, went on the ground of waiving the privilege of the attorney in C. B. 5 Mod. 310. But a privileged person may plead his privilege, notwithstanding that he is in custody of the marshal, and declared against as in custody. Per Ld. Holt, 1 Ld. Raym. 93.

By the court. This does not appear to us to be such a case as entitles the party to a privilege from arrest in the present case. He was lawfully in custody on the surrender of his special bail, and of course could not attend his cause with Cochran and Thursby, even if the trial was going on. In this state of incapacity the plaintiffs might well arrest him. He was already in actual custody.

Motion denied.

Vid. 2 Bl. Rep. 823. Even where a defendant is illegally in custody at the suit of one plaintiff, he is not privileged from arrest at the suit of another, unless there be some collision.

ROBERT HAMILTON and HUGH ELLIOT *against* JOHN M. TAYLOR,
spécial bail of EDWARD FOX.

No one shall suffer by the mistake of the clerk ; therefor bail was relieved, where the principal offered to surrender himself in due time, but was prevented by the *scire facias* being entered as of a prior term.

The *scire facias* in this cause was tested on the 19th March 1791, returnable to the September term following ; but, by a mistake in the prothonotary's office, was entered in the docket as of March term 1798. It appeared by the affidavit of Fox, the principal, that he attended on the return day of the *scire facias*, to surrender himself in the discharge of his bail, but that Mr. T. Ross, the attorney of the plaintiffs, informed Mr. J. M'Kean, his attorney, that he came too late, and on inspection of the docket this appeared to be the case. A judgment was afterwards entered, a *feri facias* issued, which was returned executed, and a *venditioni exponas* issued thereon. A rule was obtained to show cause, why the judgment should not be opened and the executions set aside ; against which Mr. Ross now objected, that the application should not now succeed. The defendant had been guilty of negligence. He knew when the *scire facias* was served on him, and should have applied to the court at the following term. He could be led into no error by the mistake in the office. The rules as to bail are strict, and should be adhered to. If the principal dies between the return of the *ca. sa.* and the second *scire facias*, the bail cannot be relieved. 1 Stra. 511. Cro. Jac. 165.

By the court. It is a general rule, that no one shall suffer by the mistake of the office of the court. Besides it is shown here, that the plaintiff's attorney led to the mistake ; and that opinion would be fortified by an examination of the record.

Let an *exoneretur* be entered, on payment of the costs on the *scire facias*.

SHIELDS and wife, late MARY SHUBERT *against* WILLIAM IRWIN and
JOSEPH REED, esq., executors of THOMAS MIFFLIN, esq.,

T. M. executed an instrument under seal, declaring, that in consideration of the care and attention shown him by M. S. during his illness, he was justly indebted to her, and declaring that his executors or administrators should pay her in 1 year after his decease, \$1000, which was delivered to M. S.; held, to be an obligation and not a testamentary disposition.

JUDGMENT was confessed in favour of the plaintiffs, subject to the opinion of the court, on the following case.

Thomas Mifflin, esq. executed an instrument of writing as follows :

“In consideration of the care and attention shown to me by Mary Shubert, formerly of Germantown, during several severe fits of illness, I acknowledge myself justly indebted to her, and as a consideration for her said care and attention, I hereby declare that my executors or administrators, as the case may be, shall in one year after my decease, pay to the said Mary Shubert one thousand dollars, and the value of twenty five pounds in furniture for a room, besides a bed and its furniture. Witness my hand and seal this 13th day of January 1796.

Thomas Mifflin, L. S.”

And then and there delivered the same to the above named Mary Shields, then Mary Shubert. Susan Stone was present at the execution thereof, but did not subscribe the same as a witness. The said Thomas Mifflin afterwards, on the 29th November 1797, duly executed a last will and testament, and appointed the above named defendants his executors, who have proved the will and taken upon themselves the execution thereof.

The question for the opinion of the court is whether the above instrument be an obligation for the payment of money, upon which an action of debt may be sustained against the executors, or a testamentary disposition? If the court shall be of opinion that it is an obligation, then the above judgment to remain in force. But if they shall be of opinion, that it is a testamentary disposition, then the above judgment to be set aside, and a judgment of nonsuit entered.

S. Levy, *pro quer.*

March 12, 1802.

John Sergeant, *pro def.*

The case was submitted to the court without argument.

The court were clearly of opinion, that the instrument operated as an obligation, by the intention of the parties. It was given for a just debt, and was delivered to the creditor. The payment only was deferred until after his death, and was then to be made by his legal representatives. In this there is nothing illegal. (Vide 8 Term Rep. 483.)

Judgment for the plaintiffs.

The President, Directors and Company of the Bank of the United States *against* EDWARD RUSSEL and JEREMIAH BOONE.

An alteration of the date of a promissory note by payee, whereby the time of payment is retarded, and afterwards discounted with innocent persons by the payee on indorsing it, avoids the note.

THE plaintiffs declared on two counts. 1st On the defendants promissory note, dated 9th June 1798. 2d. On another note dated 19th June 1798.

On a trial this term, the jury found the following special verdict. The jury, &c. say:

That Edward Russel and Jeremiah Boone, the defendants, did on the 9th day of June 1798, draw and sign a certain promissory note, being the same note stated in the first count in the plaintiff's declaration, bearing the same date, for the sum of 1500 dollars, payable to a certain Joseph Thomas, or his order, at 60 days after date, which note was delivered to the said Joseph Thomas and by him indorsed, but whether the said indorsement was before or after the alteration of the date hereafter mentioned, the jury do not find.

And the said jurors further find, that on the 21st day of June, in the same year, the said Joseph Thomas applied to the plaintiffs in the usual course of business to have the same discounted, and on the 22d day of June in the same year, the plaintiffs discounted the same, and paid or credited to the said Joseph the sum of being the full amount of the said note, deducting the discount therefrom. That at the time the said note was so discounted, the note had been altered from its original date by the said Joseph Thomas, without the knowledge, consent or approbation of the defendants, so as to purport to be dated the 19th day of June. That the plaintiffs were ignorant of the said alteration, and had no reason to believe that it had borne any other date than the 19th day of June. That on the 21st day of August 1798, the plaintiffs applied at the counting house of the defendants for payment, but they were then absent from the city, on account of the yellow fever. That Joseph Thomas, the indorser, is insolvent, and absconded from his usual residence on the 3d day of August 1798, and has not since been heard of. That at the time of giving the said note, the defendants received from the said Joseph Thomas a note, dated the 9th day of June 1798, for 1500 dollars, payable to the defendants at 60 days after date, which was intended as a counter note to secure the defendants, which same note the defendants having indorsed and had discounted, have since been obliged to take up. And that the said note, so given by the said Russel and Boone to the said Joseph

Thomas was an accommodation by them to the said Joseph Thomas.

If upon these facts, the law is in favor of the plaintiffs, then the jury find for the plaintiffs, and assess damages at dollars ; but if the law is in favor of the defendants, then the jury find for the defendants.

Mr. Tilghman for the defendants barely cited the case of *Master et al. v. Miller*, 4 Term Rep. 320. which was affirmed on error in the Exchequer Chamber. 2 H. Bla. 141. The authority of that case is conclusive on the point in question.

Messrs. Lewis and Rawle for the plaintiffs contented themselves with observing, that this case differs from that relied on. There an erasure was made on the date of a bill of exchange after acceptance, whereby the payment of a bill would be accelerated. But here an alteration of the date of the note was made, whereby the payment would be retarded. The reasoning of Judge Buller in *B. R.* was replete with good sense ; but they candidly admitted, that the principle of decision adopted by the majority of the court, applied to the principal case.

By the court. It cannot be questioned, that the material alteration of a deed will render it of no effect, and this rule is equally applicable to bills of exchange and promissory notes. The remark is certainly correct, that more dangerous consequences would result from permitting alterations on bills and notes than on deeds, the former being more readily susceptible of alteration than the latter, to which the names of witnesses are uniformly subscribed.

Judgment for the defendants.

JACOB SHOEMAKER, assignee of **AMBROSE VASSE**, a bankrupt
against **JOSEPH NORRIS**.

The liens of tradesmen, who have built, repaired or fitted vessels, continued under the act of 27th March 1784 until such vessels proceed to sea, though the owner thereof becomes a bankrupt.

AMBROSE VASSE, owner of the schooner *Friendship*, employed a number of tradesmen of the description enumerated in the act of assembly, entitled, “ An act to secure the persons employed in the building and fitting ships and vessels for sea, by making the body, tackle, apparel and furniture of such ships and vessels liable to pay the several tradesmen employed building and fitting them for their

work and materials," passed 27th March 1784, in repairing the said vessel ; and one of the said persons on the 15th February last, filed his bill in the manner prescribed by the supplement to the said act passed 9th February 1793, against the said vessel, and had an attachment laid on her, and after due proceedings, an order or decree of the Court of Common Pleas of Philadelphia county was on the 4th March 1802 granted, directing the same vessel, with her tackle, apparel, &c., to be sold to satisfy the demand of the libellant, Joseph Norris, shipright, and thereupon process was issued to the sheriff of Philadelphia county, directed, commanding him to sell the same, (*prout* record and process,) which said order of sale was delivered to the said sheriff on the 4th March 1802, and he by virtue thereof advertised the said schooner for sale.

After making the decree, and before the sale of the said schooner, two other libels on different days, by four other persons of the description mentioned in the said acts of assembly, were filed, and attachments issued against the said schooner, and she was by virtue thereof also attached, but the said two last attachments are still depending.

On the 13th February 1802, Ambrose Vasse, owner of the said schooner, committed an act of bankruptcy, and on the same day a commission of bankruptcy issued against him, and he was declared a bankrupt ; and on the 23d of the same month, a provisional assignment of his estate and effects was made to the said Jacob Shoemaker, who gave notice to the sheriff not to proceed to sell the said schooner. But it was afterwards agreed, that the said sale should take place by virtue of the said process, without prejudice to the rights of either party, and the proceeds of the sale should be paid either to the provisional assignee, or the plaintiff in the said attachments, as the court should direct.

It was further agreed, that all the work was done by the libellants, before the act of bankruptcy committed.

The question for the opinion of the court is, whether the said attachments being laid after the commission of bankruptcy had issued against the said Ambrose Vasse, will entitle the plaintiffs to recover ;—or whether they are entitled to more than a dividend in common with other creditors of the said bankrupt ?

If the court shall be of opinion in favor of the plaintiffs in the said attachments, it shall be held to extend to all those, who have a legal right by virtue of the said acts of assembly to any part of the proceeds.

W. Rawle, for the assignee.

John C. Wells, for the libellants.

The plaintiff's counsel contended, that the attachments here, not having been executed, or even filed until after the act of bankruptcy committed, the case would be governed by the 31st section of the law of congress, passed on the 4th April 1800, (5 U. S. Laws, 67) which directs, that every creditor having security for his debt by judgment, statute, recognizance or specialty, or having an attachment under any of the laws of the individual states, unless there be an execution executed at the time of the bankruptcy, shall not be relieved for more than a rateable part of his debt, with the other creditors of the bankrupt. The tradesmen here, had no liens for their debts as factors. Their claim to a preference is founded on their attachments.

The defendant's counsel insisted, that the section of the law of congress relied on was explained by the 1st section thereof.—Two of the clauses are, that if any merchant, &c., shall willingly or fraudulently procure him or herself to be arrested, or his or her lands, goods, money or chattels to be attached, sequestered or taken in execution,—or whose lands or effects being attached by process issuing out of, or returnable to any court of common law, shall not, within two months after written notice thereof, enter special bail and dissolve the same, shall be adjudged a bankrupt. These clauses are borrowed from the British statutes of 1 Jac. 1, c. 15, and 21 Jac. 1, c. 19. And it has been settled, that the word attach, being coupled with arrest and sequester, the legislature meant that sort of attachment by which suits are commenced. Cowp. 428, which is recognized in Co., Bankrupt Laws, 76. The latter clause clearly assigns that idea to the term, and that it only means such process whereby an appearance is compelled. Congress may pass general laws within the limits of the constitution of the United States, but cannot repeal the municipal laws of the different states. At least it may be said that to do this, the words of the act of the union must be clear and express.

By the law of this state of the 27th March 1784, § 2, (2 St. Laws, 186,) all ships and other vessels are made liable for the bills of tradesmen employed in building, repairing and fitting them for sea, in preference and before any other debts due and owing from the owners thereof. And the 6th section limits the continuance of such liability to the time which shall intervene between the contracting of such debts, and the time of such vessels proceeding to sea next after the work done, or the articles provided. The state admiralty court being abolished, the supplement to this act of the 9th February 1793, directed that the stipulation and libel should be in the Court of Common Pleas. 3, St. Laws.

Here then is a specific lien given by positive law in favor of a meritorious class of creditors, which is only discharged by the vessels proceeding to sea. The act of congress does not interfere with it. Leins are beneficial to trade, and consonant to natural justice; and courts lean in favor of them. 4 Burr. 2121. When goods have been sent by a bankrupt on board a ship to be conveyed to his correspondents abroad, the commissioners cannot seize and take them away without paying the freight. Co. Bankrupt Laws, 96. 7. Moll. 253. Suppose the case of wages due to seamen, and the owner becomes bankrupt before the voyage is performed, is not the vessel still chargeable with their wages?

The plaintiff's counsel replied, that the principal case was distinguishable from those referred to. He seeks no possession of goods, on which the libellants have either a general or special lien. The tradesmen here lost any lien which they ever might have had by their delivering up possession of the schooner. Doug. 101. 1 Stra. 557. 1 Atky. 234.

The court were clearly of opinion, that the implication arising on the act of assembly, was irresistible, that the lien of the tradesmen continued, until the vessel went to sea again. The act of congress effects no alteration therein.

Judgment for the defendant.

SAMUEL POTTER, WILLIAM PAGE, and THOMAS PRICE *against* JOHN NORMAN and JOSEPH NORMAN.

I, in custody under a *ca. sa.* gave bond with security to comply with the requisites of the insolvent act passed 4th April 1798, and accordingly filed his petition in the Court of Common Pleas in June following, and being opposed by his creditors, proceedings were stayed until the next August term, and a new bond given. At the August term it was objected, that he had not filed an inventory with his petition, but the case was continued under advisement, and he did not surrender himself. In November term the court discharged the petition. Quære, whether the second bond so given, is forfeited?

CASE stated for the opinion of the court. Summons in debt 260*l.* returnable to September term 1800, in Montgomery county. Sheriff returned, summons served on Joseph Norman, and *nil habet* as to John Norman.

An action was commenced in the Court of Common Pleas of Montgomery county to February term 1799, by the above plaintiffs against John Norman, one of the above defendants, and judgment was entered for the sum of 127*l.*, 11*s.* 0*d.*, in August term 1799. A second *pluries capias ad satisfaciendum* issued, returnable to May term 1800, upon

which the sheriff of the said county returned *cepi corpus*, and the said John Norman was committed to the prison of the said county. At the same term, the said John Norman petitioned the Court of Common Pleas of the said county for the benefit of the act of assembly, entitled, "an act providing that the person of a debtor shall not be liable to imprisonment for debt, after delivering up his estate for the benefit of his creditors, unless he hath been guilty of fraud or embezzlement" passed on the 4th April 1798, and remained in the custody of the keeper of the said prison, until after the adjournment of the said court, to wit, until the 20th day of May, when the said John Norman gave bond to the said plaintiffs, conditioned for the appearance of him the said John at the next term, to take the benefit of the said act of assembly, and comply with all the requisites thereof, in which said bond, the said Joseph Norman became bound with the said John, for the faithful performance of the condition of the said bond.

On the 20th day of June, the same year, at an adjourned court appointed for the discharge of insolvent debtors, the said John Norman appeared to take the benefit of the said act of assembly; when, upon being opposed by his creditors, proceedings were stayed until the next term; and the said John Norman and Joseph Norman by agreement with the plaintiff at that time, entered into another bond, conditioned for the appearance of the said John at the next term, to take the benefit of the said act of assembly, and comply with all the requisites of the said act, the said John for himself, and the said Joseph for the faithful performance of the said John, the former bond being considered by all parties, null and void.

At August term 1800, being the next term, upon John Norman's appearance to take the benefit of the said insolvent act, a motion was made by his creditors to discharge the petition, on account of no inventory being filed with his petition, nor a statement of his debts and credits, under oath. No decision took place at that time, but the case was held under advisement until the next term. The said John Norman was not discharged at that time, agreeably to the prayer of his petition, not did the said John Norman surrender himself, nor was he surrendered by his said security, to the keeper of the prison of the said county, at that time.

On the first day of November term 1800, the said Joseph Norman in open court, surrendered the said John Norman into the custody of the sheriff of the said county of Montgomery, and he was thereupon committed to prison; and afterwards on the same day, at the instance

of the creditors of the said John Norman, the said petition of the same John was discharged for the irregularity above stated.

If the court shall be of opinion, upon the circumstances of the above case, that the bond so given by the said John Norman and Joseph Norman on the 20th June 1800, was forfeited before this action was commenced, then judgment to be entered for the plaintiff for the sum of 127*l.* 11*s.* 0*d.* with interest from the 1st August 1799, with costs of suit in this, and the action in Montgomery county; otherwise, a non-suit to be entered.

Jno. Ewing, jun. *pro quer.*

Jas. Milnor, *pro def.*

Messrs. Tilghman and S. Ewing for the plaintiff, insisted, that the provisions of the act of 4th April 1798 should be strictly enforced. The 1st and 2d sections, (4 St. Laws 269) point out the mode of application by insolvent debtors under this act, and direct that a schedule of all their property together with a list of their creditors, shall be exhibited and annexed to their petitions; and the 14th section prescribes the form of the bond and condition that the petitioner shall surrender himself to prison, in case, on his appearance, he does not comply with all things required by the act to procure his discharge, &c. Patrick Moore was remanded to goal by this court, on the ground of his not having annexed a statement of his property to his petition; and such is every day's practice. The law cannot be said to be remedial; its consequences were highly injurious to the community. If the insolvent court had discharged John Norman without the schedule directed by law, it would have been competent to the plaintiffs to have brought the present suit; but that court have in effect declared that he did not comply with the condition of his bond. On a covenant to do an act in a specified time, the party is obliged to perform it. 3 Burr. 1637.

Messrs. Rawle and Milnor for the defendant. It is certainly a hard case, if the defendant is chargeable under all the circumstances stated. In judging of a new law, the old law, mischief and remedy must be considered. 1 Bla. Com. 87. The mischief should be suppressed, and the remedy advanced. The act is founded on the state constitution, and its title sufficiently evinces the humane intentions of the legislature. All its provisions breathe the same benevolent spirit; and this court will strain none of its expressions to injure an innocent bail. The cause of action arises out of the process of another court, which would not in England be permitted in the case of bail, the original court

being necessarily presumed to be better acquainted with the circumstances of each case before them. The essence of the condition of the bond is, that the party shall appear, and obey the decision of the tribunal which he has petitioned. It is nowhere said in the act, that the schedule may not be filed at any time during the term. And in the cases of John M. Taylor and Blair M'Clenachan, they were allowed to amend, notwithstanding it was opposed by their respective creditors. The court of Montgomery alone could decide on the regularity of the petition. If they had decided against it, the prisoner might have immediately petitioned *de novo*. Until they had decided, the proceedings remained in suspense; but their doubts ought never to affect the bond. The court constantly relieve bail on mesne process, even after forfeiture of the bond, where no injury or delay is effected thereby. They had an unquestionable right to adjourn the consideration of the objection made to the petition, and the postponement being the mere act of the court, unopposed by the adverse counsel, ought not now to work a mischief to the defendant.

Curia advisare vult.

MEMORANDUM.

The city of Philadelphia was again visited by the yellow fever, which proved fatal to many of the citizens in the close of the summer of 1802. The judges of the Supreme Court met on the first day of the September term, and adjourned until the last day of the term. No other business was done, than making of a few rules, and accepting the sheriff's returns to process.

AT A CIRCUIT COURT, AT HUNTINGDON, MAY, 1802.

CORAM, YEATES AND BRACKENRIDGE, JUSTICES.

Lessee of JOHN NICHOLAS, JOSEPH CRUNCKLETON and JOHN SELLERS,
executors of EDWARD NICHOLAS *against* WILLIAM HOLLIDAY and
JOHN HOLLIDAY.

A warrant issued without money paid, and an inofficial survey thereon, permitted to be read in evidence.

An application for a warrant in 1763 will not authorize a survey, nor can a warrant, directed to one deputy surveyor, be executed by another, without his authority.

A departure from the usual forms of the land office, affords grounds of suspicion.

The lines of a survey may be extended before it is returned, where no injury is done to other claimants.

EJECTMENT for 200 acres of land in Frankstown township.

The plaintiff claimed under a warrant to Edward Nicholas for 150 acres, including his improvement, about one and a half miles from the forks of Frankstown Branch, in Cumberland county, dated the 6th September 1762, on which 7l. 10s. was paid into the office of the receiver general, and a survey thereon of 199 acres and 17 perches, made 25th May 1765, by Samuel Finlay, who acted under Richard Tea, the surveyor of the district. Finlay surveyed four other warrants at the same time, amounting in the whole to 1100 acres, but having included only 550 acres, he in the month of July following extended the lines of the different surveys in his drafts, by order of Tea, who made pretensions to the adjoining lands. Edward Nicholas, by his will, directed that his lands on Juniata should be sold and the money divided amongst his children.

The defendants set up a defence under the copy of an application entered in a land office in warrant book T, on 3d March 1763, in the name of James Haldane for 300 acres on the south side of the middle fork of Frankstown township branch, including a dry draft above the hill, which closes in and stops the passage on that side of the creek in Cumberland county; also on a like application entered on the same day, in the name of Timothy M'Kinley, for 300 acres, (described as above,) about one and a half miles above the draft.

Two warrants appeared to have issued on the same 3d March 1763, to Haldane and M'Kinley, describing the lands as in their respective applications. They were both directed to Thomas Smith, with the following indorsements signed by John Lukens, surveyor general. "It is supposed the land for which this warrant was granted interferes with

prior warrants. Execute this warrant on the land left out by prior warrants and make return into my office."

Copies of surveys made by Richard Tea, in pursuance of these warrants, on the 18th May 1765, were offered to be read in evidence, the one for Haldane containing 301 acres; the other for M'Kinley, containing 287 acres, which appeared to have been returned into the surveyor general's office on the 27th March 1767.

The applications, warrants, and surveys, were opposed as evidence by the plaintiff's counsel. As grounds of objection, they showed a certificate from the surveyor general, that there were no warrants in his office to Haldane and M'Kinley, but that certified copies of the applications were filed therein as of the date of 14th July 1794; another certificate from the receiver general, that no money appeared to have been paid in his office either on the applications of Haldane or M'Kinley; also two surveys by Thomas Smith, made on the 2d December 1774, the one for Haldane containing 243 acres, and the other for M'Kinley, containing 243 $\frac{1}{4}$ acres.

They contended, that the application for a warrant was no authority to survey lands in 1763. The papers produced were mere copies from the warrant book, and it is well known, that the introduction of locations or applications as grounds of surveys, did not obtain until August 1766 in the proprietary land office.

The warrants must have issued fraudulently or improvidently. No warrants ever issued without money being previously paid, or without reciting a consideration as services performed, &c. But granting to these warrants a degree of validity, to which they are not entitled, what authority had Richard Tea, to execute them? He could not legally act without a deputation. But they are specially directed to Thomas Smith, and he is interdicted expressly from surveying any lands which might interfere with prior warrants, which he certainly would not have done if he had known the true state of the facts. The very execution of the warrants by Mr. Smith was an abandonment of the former surveys, supposed to have been made by Tea. They were not warrants of re-survey. To afford a feeble prop to the unofficial surveys of Tea, copies of the applications are surreptitiously thrust into the surveyor general's office as of July 1794.

By the court. The papers offered come before the court in a very questionable guise, and wear a suspicious appearance. But let them be read, as was done last Circuit Court at Bedford,

in Dougherty's lessee *v.* Piper, in a case resembling the present. We will judge of their legal operation, and facts will arise on them, of which the jury are the constitutional judges.

It appeared in the course of the trial, that Haldane and M'Kinley had in June 1764, conveyed their respective warrants to John Little and Richard Tea, in consideration of 5l., and that the defendant, William Holliday, on the 25th April 1774, had entered into an agreement for 500 acres, part thereof at 20s. per acre.

After the cause had been fully argued by Messrs. Duncan and Walker for the plaintiff, and Messrs. Hamilton and Watts for the defendants, the court charged the jury, that it was obvious the application for a warrant in 1763, before the system of locations was adopted, did not authorize a survey. Neither could a warrant, directed to Mr. Smith, justify a survey and return by Tea, unless by the authority of the former. The act was unofficial. It is true, the late proprietaries might bind themselves by warrants issued in a new mode, but this departure from the usual forms of their land office must be shown to have been intentional, by strong and cogent proof; otherwise the transaction would certainly give just cause of suspicion of unfair practice. And it is clear, that the proprietary officers could not by such unusual procedure, divest or affect the interests of grantees claiming under prior rights, who had paid their money in confidence of such contract.

With respect to the extension of the lines of a survey, the practice had been for surveyors to run and mark the boundaries on the ground, and afterwards calculate their contents. They could then add to or diminish the quantities surveyed on the closing lines. But if any great mistake had been made, careful surveyors usually went on the ground again and made new surveys, obliterating their former marks. After a survey was returned into the surveyor general's office, the lines could not be extended without a new warrant or order of survey, their former authority being *functus officio*. But before such return, the surveyors might extend the lines of a survey made by mistake, where no injury resulted to other claimants. Here the mistake was made by the agent of Tea himself, who surveyed only one half of the quantity of the lands called for by the warrant; the lines were extended by his direction, who claimed the lands thereby included. *Quilibet potest renunciare juri pro se introducto*.

Verdict for the plaintiff.

AT A CIRCUIT COURT, AT LEWISTOWN, MAY, 1802.

CORAM, YEATES AND BRACKENRIDGE, JUSTICES.

Lessee of SAMUEL SIMPSON *against* JOHN WILLIAMS and JAMES GREEN.

A dormant application whereon no survey has been made, is within the limitation act, though the adverse party claiming under the same application has made a survey thereon.

EJECTMENT for 358½ acres in Upper Bald Eagle township.

The plaintiff claimed under an application dated 3d April 1769, No. 794, for 800 acres of land, and a survey thereon of 358½ acres by Charles Lukens, on the 12th March 1775.

It was incontestibly proved, that the lessor of the plaintiff had applied in the secretary's office for the location, but he gave no evidence either positive or circumstantial, that he paid the surveying fees, procured the survey to be made, or made any attempt to procure one.

The defendants, as tenants of Christian Miller and Richard Miles, claimed under the same application and survey, a warrant of acceptance and patent thereon, dated February 1784; a conveyance from a different Samuel Simpson to Henry Funk, of the premises, in consideration of 100l, dated 18th May 1784, and another conveyance from Funk to Christian Miller, in consideration of 106l., dated 4th April 1792.

It appeared that the lessor of the plaintiff had not claimed these lands till within a few years past; that the survey had been shifted from the lands described in the application; and, from presumptive evidence, that it had been directed by the Simpson under whom the defendants claimed; and that the premises, which in 1784, would not have sold for more than 5s. per acre, would now sell for 45s.

The court expressed their opinion, that this was a dormant application so far as it respected the plaintiff; that it was barred by the limitation act of 26th March 1785, and cited the case of *Ewing's lessee v. Barton*, at Nisi Prius in Sunbury, May 1798, as analogous hereto; and that the defendant's title gained additional strength from

their landlords being considered as *bona fide* purchasers of the legal estate, for a valuable consideration without notice.

The plaintiff's counsel reluctantly suffered a nonsuit.

Mr. Walker, *pro quer.*

Messrs. Duncan and Roberts, *pro def.*

Lessee of JAMES BRICE *against* RICHARD CURRAN.

The 5th section of the limitation act of March 26, 1785, only refers to warrants issued before the law was enacted.

EJECTMENT for 50 acres of land in Lark township.

The plaintiff claimed under a warrant to John Brown, dated 5th April 1788, for 50 acres, including an improvement, bounded, &c. ; interest to commence from 1st March 1761 ; and a survey made thereon by James Harris on the 8th March 1796. Brown had raised a crop on the land in 1788, but neither he, nor the persons claiming under him, had any actual subsequent possession. There was an adverse possession when the survey was made, and the surveyor was forbidden to execute the warrant on the lands. The suit was brought to August term 1800.

Exception was taken by the defendant's counsel to the showing of the survey in evidence, on the grounds of the limitation act, passed 26th March 1785, § 5, 2 St. Laws 282. It is an act of repose, and highly beneficial, and pursues the statute in England of 21 Jac. 1, c. 16. A warrant gives no title to lands, but only authorizes a survey within six months thereafter. Here there was no survey made within seven years after the date of the warrant, nor any possession antecedent to the commencement of the suit for eleven years. But the act requires the quiet and peaceable possession of the lands within seven years next before the entry or bringing the action. These words refer equally to warrants and settlements ; and after the seven years, the warrant without a survey shall be presumed to be abandoned, in the same manner, as a bond shall be presumed at common law to be paid after the lapse of twenty years, unless the legal presumption be repelled by other proof.

The plaintiff's counsel answered. The words of the 8th section are, " No person or persons, that now hath or have any claim to the possession of any lands, or the pre-emption thereof from the commonwealth, upon any warrant whereon no survey hath been made ; or in consequence of any prior settlement, improvement or occupation, without other title, shall hereafter enter or bring any action for the recovery

thereof, unless he, she or they, or his or their ancestors or predecessors, have had the peaceable and quiet possession of the same, within seven years next before such entry or bringing such action," with a provision, in favor of persons driven away from their possessions by the savages. Now it is obvious, that the words are confined to claims existing at the passing of the act, and not to future claims, the word *now* being made use of. It is also clear, that there are two independent clauses, marked by the disjunctive or, referring to claims by warrant or improvement. The expressions "without further title," refer to improvements alone; those following unless may refer to warrants also; so that it will read thus: A warrant whereon no survey has been made, or an interrupted settlement, may justify an entry or support an action provided there has been a quiet and peaceable possession of the lands within seven years next before such entry or action. The act in no part of it directs, that a survey shall be made on a warrant within seven years after its being issued; or that in the case of a warrant, accompanied with a survey, it is necessary there should be a possession within seven years before the suit brought. The construction has never obtained, that the survey under a warrant should be made in six months. It would defeat the titles of many valuable estates. Indeed it has often been said from the bench, that so far from warrants not conferring a title to lands where the full purchase money has been paid, that in the instances of their being specially and exclusively descriptive of certain lands, as of an island encompassed by water, &c. an ejectment might be supported on such a warrant without a survey, and that such case was not within the limitation act. Here there was a warrant subsequent to 26th March 1785, and a survey thereon regularly made, in addition to an improvement made many years ago.

The court directed the survey to be received in evidence, and said, the limitation act only referred to warrants issued before the law was enacted; and Yeates, J. observed, that he was of opinion, that the doctrine of the plaintiff's counsel was accurate and correct throughout.

The defendant claimed under an earlier application and improvement; and after the evidence on both sides was received, the cause was submitted to the jury without further argument, was found a verdict for the defendant.

Messrs. Hamilton and Walker, *pro quer.*

Messrs. Duncan and Watts, *pro def.*

Lessee of PATRICK MURPHY *against* THOMAS M'CLEARY and DANIEL DEVINNEY.

Court on the trial of lands sold by the sheriff, will not examine whether the jury who condemned them acted erroneously, or whether the same were sold at an undervalue; but it is essential, that the sheriff's deed should be acknowledged in open court, after the return day of the writ.

EJECTMENT for 190 acres of land in Lack township.

The cause depended wholly on the validity of a sheriff's deed.

The facts disclosed were as follow :

The transcripts of two judgments had before a justice of the peace against Thomas M'Cleary, one of the defendants, were filed in the prothonotary's office, in pursuance of the act of 1st March 1745-6, § 3, (1 St. Laws, 306.) Writs of *fieri facias*, were issued thereon, returnable to April term 1799, on which the premises were levied on, and afterwards condemned by inquisition ; and afterwards writs of *venditioni exponas*, tested 8th April 1799, returnable on the second Monday in August following, on which the sheriff returned, that he had sold the lands to the lessor of the plaintiff for 51l. on the 14th May 1799. On the 15th May 1799, William Elliot, the sheriff, executed a deed to Murphy, reciting the previous proceedings, which was acknowledged at an adjourned Court of Common Pleas on the same day, more than three weeks before the return day of the *penditionis*.

It did not appear, when the *venditioni* issued, on which the sale was had ; but the probability was, from circumstances, that it was not taken out before the sale. In the beginning of October 1800, notice was served on M'Cleary to appear at the Court of Common Pleas, in November term following, to show cause, why the deed should not then be acknowledged by the sheriff, (who is since dead ;) but the court refused to receive the acknowledgment at that time, and referred the plaintiff's lessor to his ejectment.

The demise in the declaration, was laid on the 10th June 1800.

The first exception taken to the sheriff's deed, was, that the jury who condemned the lands acted erroneously, as the profits of the same would pay the debts and costs in 7 years, of which the defendants proposed to give evidence.

Sed per cur. If there has been any injury done herein, or if the jury have refused to receive evidence of the yearly value of the premises, application should have been made to the court from whence the process issued, to quash the inquisition.

The second exception was, that the premises were struck off at a great under value, not $\frac{1}{4}$ th of what they should have produced.

Sed per cur. This is no ground of relief, if the sale was fairly conducted, and due notice given. And it appears that the sale was adjourned from the 13th to the 14th May.

The third exception was, that the sheriff had no authority to sell without a *venditioni exponas*, taken out in due time, on which he had given at least ten days notice before the sale.

The court said, that if the cause progressed, this must be left to the jury, as a fact to be decided on by them, under all the circumstances.

The fourth exception was, that the acknowledgment of the deed was premature and rendered the deed invalid. Exceptions to sales by sheriffs cannot be made until the return of the *venditionis*; and the sheriff cannot be compelled to return them, until the days therein commanded. The acknowledgment of such deeds on a prior day, would effectually defeat all applications for relief, let the case be ever so gross.

The plaintiff's counsel answered, that they had substantially complied with the law, by giving notice to the defendant, to appear at November term 1800, to make his objections to the acknowledgment. After the first error committed, every thing had been done, which was in the plaintiff's power; and he was not in fault, that the Court of Common Pleas did not proceed on the notice served. The effect would be, that every thing was now open for investigation, and every objection might be made, as if the parties were before the Court of Common Pleas, on a motion to set aside the sale.

Sed per cur. The acknowledgment of a sheriff's deed is necessary to give it validity. The act of 1705, § 4, (1 St. Laws. 69,) directs that the deed shall be duly executed and acknowledged in court, as has been heretofore used upon the sheriff's sale of lands. The premature acknowledgment of the deed on the 15th May 1799, is of no effect whatever. And with respect to the notice served in October 1800, we can take no judicial information of it, being subsequent to the day of the demise laid in the declaration.

The plaintiff suffered a nonsuit.

Messrs. Hamilton and Walker, *pro quer.*

Messrs. Duncan, Clarke and Watts, *pro def.*

AT A CIRCUIT COURT, AT CHAMBERSBURGH, SEPTEMBER, 1802.

CORAM, SMITH, JUSTICE.

RESPUBLICA *against* ROBERT NEWELL, esq.

In an indictment for perjury in answering interrogatories on a rule to show cause why an attachment should not issue for a contempt in speaking opprobrious words of the court, in a civil suit, the interrogatories may be entitled as between the state and the party, and the perjury be assigned in the answers thereto, before the attachment actually issued.

Such indictment is sufficiently certain by averring that the party was sworn in due form of law.

THE defendant was tried at the last Circuit Court for Franklin county on the 29th September 1801, before Yeates and Smith, Justices, and convicted of perjury on the following indictment.

Of August sessions, Anno Domini 1800.

Franklin county, ss.

The grand inquest for the county of Franklin, upon their oaths and affirmations respectively do present, that at a Court of Common Pleas, held at Chambersburgh, in and for the county of Franklin, before James Riddle, esq. and his associates, judges of the said court, upon the 30th day of December, in the year of our Lord 1799, a certain plea was then and there pending between a certain James Taylor, plaintiff, and a certain Thomas Shirley, defendant, upon a *certiorari*, directed to Robert Newell, esq., and returned into the said court, and the said court did then and there make a rule of the said court, in substance as follows, to wit: "Rule that R. N. esq. show cause by the next term, why an attachment shall not issue against him, for treating the process of this court with contempt, and using opprobrious words to a person who served upon him a copy of a rule of this court, while the person was engaged in that service." And the jurors aforesaid do further present, that afterwards, to wit, upon the 3d day of April 1800, at C. aforesaid, in the county aforesaid, and within the jurisdiction of this court, the said R. N. esq. of the county aforesaid, did appear in his proper person, before the said Court of Common Pleas, held by the judges aforesaid, and did then and there voluntarily and of his own free will and accord, propose to the said court to purge himself upon oath of the said contempt alleged against him, whereupon certain interrogatories were then and there drawn up in writing, and proposed to the said R. N. esq. in substance, as follows, to wit:

Pennsylvania against Robert Newell, esq.

In the Common Pleas of Franklin county.

Interrogatories exhibited on the part of the commonwealth. 1st. Did Thomas Shirley at any time previous to the last December term for this county, serve you with a copy of a rule of the Court of Common Pleas of Franklin county, to show cause why an attachment should not issue against you for a contempt of the said court? 2d. After having read the copy of the rule mentioned in the first interrogatory, did you say, "damn the court, they are a set of damned stool pidgeons,"—and say, "if the court want a copy of my judgment, they may come for it."—Or did you make use of any of the expressions above stated?

And the said R. N. did and there in due form of law, take his corporal oath before the said court, (they having sufficient and competent power and authority to administer an oath to the said R. N. in that behalf,) that he the said R. N. would true answers make to the said interrogatories; and he the said R. N. being so sworn upon his corporal oath, on the matters contained in the said interrogatories, did then and there answer and declare before the said court, in answer to the said second interrogatory, that he (himself the said R. N. meaning,) did not make use of any of the expressions therein (the said interrogatory meaning,) contained. Whereas in truth, and in fact, the said R. N. after having read the copy of the rule of court aforesaid did say, "damn the court, they a set of damned stool pidgeons." And whereas in truth and in fact, the said R. N. after having read the copy of the rule last aforesaid, did say, "if the court want a copy of my judgment," (the judgment of him the said R. N. in the said cause between James Taylor and Thomas Shirley meaning,) "they may come for it." And so the jurors aforesaid, upon their oaths and affirmations aforesaid, respectively do say, that the said R. N. on the said 3d day of April in the year last aforesaid at C. aforesaid, in the county aforesaid, and within the jurisdiction of this court, upon his oath aforesaid before the said Court of Common Pleas, (the said Court of Common Pleas then and there having sufficient and competent power and authority to administer the said oath to the said R. N.) by his own act consent, and of his own most wicked and corrupt mind and disposition in manner and form aforesaid, did knowingly, falsely, wickedly, maliciously, willfully and corruptly commit willful and corrupt perjury, to the great displeasure of Almighty God, to the evil and pernicious example of all others in like case offending, contrary to the act of general assembly, in such case made and provided, and against the peace and dignity of the commonwealth of Pennsylvania.

After conviction, the following reasons were filed in arrest of judgment. 1st. That the affidavit on which the perjury is assigned, is stated to be on an interrogatory filed between the commonwealth and the defendant, on the part of the commonwealth, without stating any proceeding between the commonwealth and the defendant, in which the said affidavit would be material. 2d. For that it is not stated, that the defendant took an oath on the holy gospel of God, or in the presence of Almighty God, by uplifted hand. For that in the assignment of the perjury, it is not stated that he did falsely, corruptly and voluntarily swear. 4th. For that the said indictment is insensible and repugnant, and is defective both in form and substance.

In support of the reasons in arrest of judgment, Mr. Duncan for the defendant, insisted, that it was necessary to alledge a proceeding and how the testimony became material. Perjury is a willful, false and corrupt oath in a judicial proceeding. The indictment stated a civil suit depending between Taylor and Shirley, in which the rule to show cause was entered; but the interrogatories are entitled *Republica v. Newell*, which was irregular until the attachment had actually issued for the contempt. The proceedings in the first instance are on the civil side of the court until attachment granted, and afterwards on the criminal side. 3 Term Rep. 253. 6 Term Rep. 642. And so it was lately decided in a case of Wayne, in the Circuit Court of the United States, held at Philadelphia. Consequently, there being no suit between the commonwealth and the defendant, when the interrogatories were exhibited, there was no foundation to warrant the interrogatories as filed.

The uniform mode of statement in indictments of the manner in which the party is sworn is, that "he took his corporal oath upon the holy gospel of God." Here it is merely laid, that he took his corporal oath, and swore, &c. It might have been laid, in order to accommodate the case to the municipal laws of the state, that the defendant was sworn in the "presence of Almighty God, the searcher of hearts," &c., if he conscientiously scrupled the form of kissing the book. But this objection was not much relied on.

This indictment is grounded on the act of assembly, which declared that the British statutes of 5 Eliz. c. 9, shall be executed here. It is not laid as an offence at common law, which might have been done, 4 Com. Dig. tit. Justices of the Peace. 148. B. 104. The words falsely, corruptly and willfully are essentially necessary in stating the crime of perjury under the statute, and form a material description of the offence. Several precedents may be found in *Stubbs Cro. Cir.*

Compa. 308 to 334. The indictment must show in what manner and in what court the false oath was taken. 2 Hawk. c. 25, § 57. And no argumentative certainty will supply their place. *Ib.* c. 23, § 82. The court must take up the facts as stated, and not the jury's conclusion. The indictment is closed by an inference from the facts before found by the jury. The words "*et sic commisit voluntarium et corruptum perjurium*," are not sufficient in the conclusion of the indictment. 3 Inst. 167. Essential epithets must be applied to the act of killing, in an indictment for murder. 2 Dall. 228. Here the words falsely, corruptly and willfully, which are materially descriptive of the crime being omitted, the indictment is substantially vicious.

Messrs. Watts and Brown for the commonwealth contended, that if there was any informality in entitling the interrogatories, it ought to have been taken advantage of in the first instance; and this was done in the case of Wayne before cited. This defendant has waived any seeming irregularity by his freely submitting to answer without taking the opinion of the court on that point previously.

The second exception was unfounded, and in a great degree abandoned.

Though the want of the words falsely, corruptly and willfully, might vitiate an indictment for perjury under the statute of 5 Eliz. c. 9, yet they were not essentially necessary in an indictment for the offence at common law. These expressions were not technical terms, like the words *murdravit, felonice cepit, rapuit, proditorie*, &c. which no circumlocution can supply. 2 Hawk. c. 25, §§ 55, 110. Perjury is a willful false oath, in any lawful proceeding in a court of justice. 1 Hawk. c. 69, § 1. Here the whole matter is set out with convenient certainty. 2 Hawk. c. 25, §§ 57. The free act of the mind, the falsehood of the oath, and the legality of the proceeding, are sufficiently alledged; and though the indictment may not be warranted by the statute of 5 Eliz. it may well be defended, at common law.

Curia advisare vult.

And now Smith, Justice, delivered the opinion of the court, as agreed upon in a conference between him and Yeates, Justice, the latter having been prevented from attending the court, by indisposition.

The defendant has been found guilty of willful and corrupt perjury, in his answer to certain interrogatories filed in the court of Common Pleas of Franklin county, touching certain opprobrious ex-

pressions, made use of by him respecting the same court. His counsel have filed reasons in arrest of judgment, which we have fully considered.

I shall first premise, that tenderness ought always to prevail in criminal cases, so far at least, as to take care, that a man may not suffer otherwise than by due course of law, nor have any hardship done him or severity exercised upon him, where the construction may admit of a reasonable doubt, or difficulty. 4 Burr. 2082. We are bound to pronounce the law, as we think it is always leaning to the favorable side, where we doubt. For so, says the law. *Rex v. Wilkes*, 4 Burr. Per Lord Mansfield.

1. The first reason in arrest of judgment is, that the deposition on which the perjury is assigned, is stated to be on an interrogatory filed between the commonwealth and the defendant, on the part of the commonwealth; without stating any proceeding between the commonwealth and the defendant, in which the said deposition would be material.

This objection was taken at the trial under another shape, and was overruled by the court. It was then said, that the interrogatories were wrongly entitled; that the plea was pending between James Taylor and Thomas Shirley, and the rule was entered in that cause; and inasmuch as the proceedings were on the civil side of the court until the attachment issued, the interrogatories should have been filed in that suit, and headed accordingly. To this point were cited 3 Term Rep. 253, and 6 Term Rep. 642, note, and the case of Caleb Wayne, lately decided in the circuit Court of the United States, for the eastern district of Pennsylvania. The answer given was, that we had not adopted that nicety of form here, which was practised in England; but at the utmost, that the defendant should have taken advantage of the informality, and showed to the court, the grounds of his refusal to answer the interrogatories. He was now too late, after he had come in and voluntarily submitted to answer. The rule was entered in December Term 1799, that the defendant should show cause, why an attachment should not issue against him, for treating the process of the court with contempt, and using opprobrious words respecting the court. This rule was grounded on due proof made of his improper conduct previous thereto. He was then actually in contempt. We considered the rule to show cause in such a case as wholly unnecessary. For contemptuous words spoken of a court, its rules of process, an attachment issues immediately of course. Sayer 114. 1 Stra. 185. The party must answer in custody; for it is to no purpose to serve him with a second

rule, that has slighted and despised the first ; it would expose the court to further contempt. 1 Salk. 84. The jurisdiction of the court on its criminal side grew out of the civil action, returned on the *certiorari* in the plea above stated, and the oath of the party became material. The issuing of the attachment is only for the purpose of bringing in the party to answer to the interrogatories ; and if he can swear off the contempt he is discharged. 12 Mod. 348. If he deny all on oath, he is set at liberty ; but he must be indicted for perjury if forswear himself. 12 Mod. 511. 8 Mod. 81. Doug. 498. Mosel. 250. 1 Stra. 444. Annal. 178. 4 Burr. 2106. When therefore Newell appeared in the Court of Common Pleas, to purge himself of the contempt charged against him, we viewed him in the same light, as if his presence had been enforced by attachment, and were of opinion, that in either case, the interrogatories should be entitled in the same manner. We considered the rule to show cause stated in the indictment, as mere matter of inducement. An indictment for perjury at an assize, may allege the oath to have been taken before one of the judges in the commission, though the names of both are inserted in the caption. Leach 154.

2. The second objection is, that it is not stated that the defendant took an oath on the holy Gospel of God, or in the presence of Almighty God by uplifted hand. The indictment charges, that “ the said Robert Newell did then and there, in due form of law, take his corporal oath,” &c. This form was approved of by Lord Hardwicke, who says, the words corporal oath may stand for lifting up an arm or other bodily member. What is universally understood by an oath is, that “ the person who takes it imprecates the vengeance of God upon him if the oath he takes is false ” 1 Atky. 20. In the great case of *Omychund v. Barker*, Ld. Chan. Baron Parker said, he did not think, *tactis sacris Evangeliiis* were necessary words ; for several old precedents are, that the party was *juratus* generally or *debito modo juratus*. Vide West Symb. 2d part, under the head of Indictments and Offences. Sec. 160. 1 Atky. 43, 44. Lord Chief Justice Willes says, that *sacrosancta Evangelia* are not at all material words in indictments for perjury. *Ib.* 46. Lord Chancellor Hardwicke asserts the same opinion, and observes that the framers of indictments are apt to throw in words, and to swell them out too much to no purpose ; therefore the old precedents are the best. *Ib.* 50. According to Lord Chief Justice Kenyon, an indictment for perjury is sufficiently certain, if it only states the defendant to have been in due manner sworn. Peake 156. Vide *Ib.* 23, *Mee v. Reid*, and Leach’s Crown Cases 348. *Mildrone’s case*.

3. The third reason in arrest of judgment is most material, and has obtained from us much consideration. It is this: that in the assignment of the perjury, it is not stated that the defendant did falsely, corruptly and willfully swear, &c.

If the indictment is considered as grounded on the statute 5 Eliz. c. 9, it is certainly defective; because the words wilfully and corruptly are inserted in the 6th paragraph, as material descriptions of the offence. And it is clearly settled, that in every prosecution on this statute, the words thereof must be exactly pursued; and therefore, that an indictment or action on the said statute, alleging that the defendant deposed such a matter false and deceptive, (2 Leon. 211. 3 Leon. 230. 1 Show. 190) or, false *et* corruptive, (Hill. 12. Cro. El. 147) or, false and *voluntarie* (Sav. 43) without expressly saying that he did it *voluntariè et corrupte*, is not good, and that such a defect cannot even be supplied by adding the words *contra formam statuti*, or concluding *et sic voluntarium et corruptum commisit perjurium*. 2 Leon. 214. 1 Leon. 230. Hetl. 12. Savil. 43. Cro. El. 147. 1 Hawk. c. 69, § 17.

The present indictment concludes, "contrary to the act of general assembly in such case made and provided." But on examining our statute book it will be found, that the only law respecting this offence in courts of justice, was enacted the 31st May 1718, the 24th section whereof goes to subornation of perjury; and the 25th section extends the English statute of 5 Eliz. c. 9, and declares, that this statute shall be put into due execution here. 1 St. Laws 143. The act of 5th April 1790, (2 St. Laws 804) which was made perpetual by the act of 4th April 1799, (4 St. Laws 399) prescribes fine and imprisonment, in lieu of the former infamous punishments of pillory and whipping. It will be further found, that this statute, of 5 Eliz. c. 9, extends to no other perjury than that of a witness; and therefore no one can come within the statute, by reason of any false oath in an answer to a bill in chancery, (Cro. El. 148. 2 Leon. 201. Dalis. 84. Yelv. 120) or in swearing the peace against another, (2 Rol. Ab. 77, pl. 5) or by reason of a false wager of law, (Noy. 7, 108) or for taking a false oath before commissioners appointed by the king, to make an inquiry concerning his title to certain lands. (Moor 627. 1 Hawk. c. 69, § 20.) It therefore necessarily follows, that if the indictment had been framed with the utmost correctness, under the statute of 5 Eliz. the offence of the defendant was not punishable thereby, because he was not a witness, examined in a court of justice, in the usual course of proceeding.

But the law is perfectly ascertained, that one may be guilty of perjury at common law in respect of a false oath, taken by him in his own cause, in answer to questions put to him in a court of law, having power to purge him upon oath, concerning his knowledge of the matters in dispute. 1 Rol. Ab. 40, pl. 15. 83, pl. 9. Cro. El. 609. So also in a court of equity. 1 Leon. 127. Cro. El. 135, 905. 1 Sid. 244. 1 Hawk. c. 69, § 5.

This introduces the great question, whether this indictment can be supported against the defendant on the principles of the common law.

It was formerly held, that no indictment grounded on a statute and concluding *contra formam statuti* could be maintained as an indictment at common law; but the contrary is now adjudged, and the words *contra formam statuti* shall be rejected as useless, where the offence is prohibited by the common law only. The substance of the indictment being found, the rest is but surplusage, which hurteth not the verdict, and it shall be taken as it may stand by law. Atky. 43. Sty. 86. 1 Sid. 421. 2 Keb. 138, pl. 5. 1 Salk. 212. 2 Hawk. c. 25, § 115. 5 Term. Rep. 162.

Perjury is defined by Lord Coke, to be a crime committed, when a lawful oath is administered in some judicial proceeding, to a person who swears willfully, absolutely and falsely, in a matter material to the issue, or point in question. 3 Inst. 164. 4 Bl. Com. 137. And in 10 Mod. 195, it is laid down that the oath must not only be false, but willful and malicious to make it perjury. Here the legality of the oath, and the propriety of the judicial procedure are indisputable. The indictment states, that the defendant did "then and there voluntarily, and of his own free will and accord, propose to the said court, to purge himself upon oath of the said contempt alleged against him; that he was then and there duly sworn on his corporal oath, and then and there did answer and declare," &c.; negating by express averments the truth of his oath, with a conclusion, that "he the said Robert Newell, the day and year aforesaid, at Chambersburg aforesaid, &c., &c., by his own act and consent, and of his own most wicked and corrupt mind and disposition in manner aforesaid, did knowingly, falsely, wickedly, maliciously and corruptly commit willful and corrupt perjury," &c. On the bare reading of the indictment, one would reasonably suppose, that the willfulness, absoluteness, falsity and malice of the oath, were sufficiently asserted and charged against the defendant. But his counsel have ingeniously objected, that it does not pursue the course of the precedents, and that the offence is not laid in a manner known to the law.

We hold ourselves bound by precedents. We flatter ourselves, we can say with Lord Chief Justice Kenyon, "it is our wish and comfort, to stand *super antiquas vias*." 7 Term Rep. 668. In criminal cases, we will not intentionally inflict new hardships on any one, let our individual feelings be what they may. To satisfy our minds in this particular, my brother Yeates and I have made diligent and painful researches into the books of entries, on the criminal law. The result of our inquiries has been as follows:

In *Rex v. Oates*. 5 St. Tri. 4, the indictment for perjury charges him, that he falsely, voluntarily and corruptly did say, &c. So on the second indictment against him. *Ib.* 70. In *Rex v. Sir Patience Ward*, 3 St. Tri. 661, the information states, that he falsely and corruptly did swear, &c. In *Rex v. Elizabeth Canning*, 10 St. Tri. 206, the indictment charges, that she did falsely, wickedly, voluntarily and corruptly say, &c. In *Tremaine's Pleas of the Crown*, pa. 136 to 167, there are thirteen indictments for perjury, all of which are laid with the epithets (or some of them) falsely, corruptly, maliciously and voluntarily, &c. In *Stubb's Crown Circ. Comp.* 308 to 334, there are seven indictments with the same epithets, applied to the acts of swearing. So in *Clift's Entries* 399, 401, there are two informations for perjury at the assizes, that the defendant maliciously, voluntarily and corruptly swore, &c. And in *Rex v. Greepe*, 5 Mod. 343, an information at common law for perjury in a trial at bar in replevin, charges the defendant, that he falsely, maliciously, voluntarily, and corruptly, on his oath, said, &c. In *Co. Ent.* 164, b. 357, a there are two precedents of actions brought in debt, on the Stat. 5 Eliz. c. 9, wherein it is laid, that the defendants voluntarily and corruptly swore, &c. And so in many other actions of debt in other books.

On the other hand, in the same book 165, b. there is a form in a deposition before commissioners on interrogatories in Chancery, wherein the epithets are not used. So in *Rast. Ent.* 481, the declaration lays the swearing without those terms, *per quod idem R. voluntarie et corruptive commisit perjurium voluntarium*.

In *officium Clerici Pacis*, (a book containing many excellent precedents) fol. 87, we find an indictment for perjury in a deposition, resembling the present case in all particulars. It states, that the defendant "being sworn, said and upon his oath affirmed and deposed in manner following, &c. Whereas in truth and in fact, &c., voluntarily and corruptly committed voluntary and corrupt perjury," &c. Again in *West's Symbol.* 119, b. § 160, another form of the same, kind occurs

for perjury in a deposition before commissioners by commission out of the court of wards. But in the same book and page, § 161 for perjury in a deposition before commissioners, by commission out of chancery on the stat. of 5 Eliz. after the words in the indictment, "whereas in truth the said H. S. did not cause, &c. neither, &c. (*negando effectum depositions,) prout prædict. W. false and corrupte deposuit et juravit, per quod,*" &c. And again Ibid 138, § 241, an indictment for perjury committed in an answer, in the exchequer at Chester, states, that the defendant on his oath "said, affirmed and swore these English words following, &c. and so the said R. in making and confirming his answer in that part aforesaid, the day of at, &c. voluntarily and corruptly committed voluntary perjury," &c. It is evident therefore, that the forms of indictment at common law for perjury, are not uniformly the same; but the words falsely, corruptly and willfully, as applied adjectively or adverbially to the act of swearing, are mere expletives to swell the sentence, in the language of Lord Hardwicke. 1 Atky. 50.

We find no adjudged case or *dictum* in the books, that such words are appropriate terms of art. descriptive of the crime of perjury, at common law, as *murdravit* in an indictment for murder *cepit* in larceny *mayhemavit* in mayhem, *feloinee* in felony, &c. 2 Hawk. c. 25, § 55. On the contrary, we do find it laid down by the judges, that an indictment for perjury at common law, does not require so much certainty as on the statute, and that it need not be in a court of record, or matter material to the issue. 5 Mod. 348. 1 Sid. 106. And in Cox's case, (Leach 69,) it was agreed by ten judges unanimously, that the word willfully, was not essentially necessary in an indictment for perjury at common law, though it was essential in an indictment for perjury under the stat. of 5 Eliz. c. 9, because the term willful in the statute, is a material description of the offence. Still it is necessary, that it should appear by the indictment, that the oath was willfully false.

It will readily be agreed, that all indictments must have a precise and sufficient certainty, and that the offences must be set forth with clearness and certainty. 4 Bl. Com. 305, 6. Every person should be apprised of the distinct charge made against him, in order that he may come fully prepared for his defence. But in the words of the human Lord Hale, "the great strictnesses and unseemly niceties, required in some indictments, tend to the reproach of the law, to the shame of the government, to the encouragement of villainy, and to the dishonour of God." 2 H. H. P. C. 193.

4. The last reason offered in arrest of judgment, is, that the

indictment is insensible and repugnant, and is defective both in form and substance. This objection being made in general terms, must necessarily refer to the supposed defects, before particularly specified and already considered.

Upon the whole, on the best consideration, which my brother Yeates and I have been capable of giving to the different reasons filed in arrest of judgment, our official duty constrains us to say, that they are not relevant in point of law, and that the commonwealth is entitled to judgment.

Judgment, that the defendant pay a fine of one hundred dollars, and be imprisoned for the term of six calendar months, and until he shall have paid the said fine and the costs of prosecution.

AT A CIRCUIT COURT, AT BEDFORD, NOVEMBER 1802.

CORAM, YEATES AND SMITH, JUSTICES.

RESPUBLICA *against* PETER ARNOLD.

Indictment for a nuisance in obstructing an ancient water course, whereby a public highway was over-flowed, and spoiled, need not state, how far in length or breadth the water stood on the road.

Such indictment laying the nuisance to be in the commonwealth's highway, or road leading from, &c. is good.

AN indictment was found against the defendant, for a nuisance, in May sessions 1801, as follows :

Bedford county, ss.

The grand inquest for the county of Bedford, upon their oaths and affirmations respectively, do present, that Peter Arnold, late of the county aforesaid, yeoman, the 22d day of April in the year of our Lord 1801, with force and arms, &c. at the townships of Coleraine and Providence, in the county aforesaid, and within the jurisdiction of this court, a certain ancient water-course, called the Raystown branch of Juniata, and a certain other ancient water-course called Dunning's creek, which said ancient water-course called the Raystown branch of Juniata, running from Londonderry township in the county aforesaid, and which said ancient water-course called Dunning's creek, running from St. Clair township in the county aforesaid, and uniting in and running through Bedford township, in the county aforesaid, and running between the said townships of Londonderry and St. Clair, and

the township of Hopewell, in the said county, across and through which the commonwealth's highway, or a road leading from the town of Bedford, in the county aforesaid, towards and unto the crossings of Juniata, in the county aforesaid, was laid out in due form of law, did obstruct and stop up, and the said water-courses so as aforesaid obstructed and stopped up, from the said 22d day of April in the year aforesaid, until the day of the taking of this inquisition, at the township of Bedford, in the county aforesaid, unlawfully and injuriously hath continued and still doth continue, by reason whereof the rain and waters that were wont and ought to flow and pass through the said water-courses on the same day and year, and divers other days and times afterwards, between that day and the day of the taking of this inquisition, did overflow and remain in the commonwealth's highway or road aforesaid, in the township of Bedford aforesaid, and thereby the same highway or road was and yet is greatly hurt and spoiled, so that the liege subjects of the commonwealth, through the same highway or road, with their horses, coaches, carts and carriages, then and at other days and times, could not nor yet can go, return, pass, ride and labor, as they ought and were wont to do, to the great damage and common nuisance of all the liege subjects of the commonwealth, through the same highway or road, going, returning, passing, riding and laboring, and against the peace and dignity of the commonwealth of Pennsylvania.

Another indictment was found against the defendant in August sessions 1801, for a nuisance, in obstructing the waters of the Raystown branch of Juniata, and thereby over-flowing the highway, which pursued the preceding form, *mutatis mutandis*. Both indictments were removed into the Circuit Court, and came on to trial at the last Circuit Court for Bedford county on the 24th November 1801, before Yeates and Smith, Justices, when the defendant was convicted on both indictments.

The following reasons were then filed in arrest of judgment.

1. For that the indictment does not state with certainty where the nuisance was, nor how far in length or breadth it did stand on the road.

2. For that the place in which the nuisance was stated to be committed, is in one of the commonwealth's highways or a road leading from the town of Bedford towards and unto the crossings of Juniata; and being in the disjunctive, cannot be supported; more especially, as it is uncertain, whether the said road is a public highway, or a private road.

Messrs. Duncan and Clark argued for the defendant. Neg-

ligence in drawing indictments ought not to be countenanced. 3 Term Rep. 473-4. Every person accused should know the specific crime with which he is charged, in order to prepare for his defence. The offence must be laid with accuracy and precision, and certainty at least to a common intent is indispensably requisite. But here the charge is indefinite.

It is necessary to show how far a nuisance extends in length and breadth. 1 Hawk. c. 76 § 88. Indictment for stopping a certain part of a road at K. is bad, nor is it good to show that the nuisance was so long or so broad by estimation. Cro. Jac. 324. It must appear to be a nuisance and in the highway. 1 Hawk. c. 76, § 89, 91.

The essence of the crime here charged, is the spoiling of a public road, by obstructing the waters of ancient water courses. But it is laid that the injury was thereby done to a highway or road leading from, &c. Our laws recognize private roads as well as public highways, and the word road, does not necessarily convey the idea of a public highway. If a supervisor had been indicted for a breach of duty in such a road as is described in both indictments, it could not be supported. The law is generally laid down, that an indictment in the disjunctive is bad; as, murdered, or caused to be murdered; forged, or caused to be forged, &c. 2 Haw. c. 25, § 58. The instances put are mere illustrations of the rule. It will not be pretended, that an indictment charging A, that he had murdered B or C; or, that he had forged a bond or note, could be maintained, though the disjunctive does not relate to the act itself, but to the description of the person or thing concerning which the crime was committed. If a law should prohibit certain acts under a penalty, stating in an indictment, that the party did this thing or that thing so prohibited, would be bad. Thus, where under the intrusion act of 11th April 1795, (3 St. Laws 793) certain persons were indicted for taking possession of, entering, intruding or settling on lands within the limits of Luzerne county, such indictments have generally been considered by counsel as defective. Here the road said to be spoiled, not being laid as a common highway and public road, both indictments must be deemed substantially defective.

Messrs. Hamilton, Riddle and Dunlap, insisted for the commonwealth, that the first exception was extremely futile; it is impossible to describe with certainty the length or breath of a nuisance in a road overflowed with water, from its constant changes either by the increase

or decrease of the stream obstructed. The present indictments are fully warranted by the precedent in *Stubb's Cro. Circ. Com.* 495.

Nor will the second exception serve the defendant. The rule that an indictment shall not be laid in the disjunctive is inapplicable to the present case. The objection has only prevailed where it went to the act itself, and which was uncertainly laid; such are the instances collected by Serjeant Hawkins, and the cases under the intrusion act cited by the defendant's counsel. Every fact must be charged directly and with precision against a defendant, that he may prepare his defence accordingly. If several independent acts are charged against him, they must be laid in the conjunctive, and he must then come prepared against all the charges. Here the words *commonwealth's highway*, control the whole sentence, and will equally refer to the word *road*. On a minute examination of all the laws respecting the highways in this state, it will be found that the legislature use the terms *highways* and *roads* in one common sense; and that unless the word *private*, or a similar adjective, precedes the expression *road*, it is uniformly used as a public highway.

Curia advisare vult.

And now, November 18th, 1802, Yeates J. delivered the opinion of the court as follows;

The first reason in arrest of judgment is, that the indictments do not state with certainty where the nuisance was, nor how far in length or breadth the water stood in the road.

On this head it was urged, that every indictment ought certainly to show to what part of the highway the nuisance extended, as by showing how many feet in length, and how many feet in breadth it contained. 1 Hawk. c. 76, § 88. Cites 2 Rol. Abr. 181. Cro. Jac. 324. Latch 183. But in *Rex v. Smith*, Trin. 27 Geo. 2. Sayer 98, it was determined that it is not necessary to set out the length and breadth of a nuisance in an indictment. The ground of the objection rested on this, that though neither the length nor breadth of the nuisance is traversable, both ought to be set out in an indictment for a nuisance, in order to guide the discretion of the court in setting a fine; but, the court said, it is not necessary on that account, regard being had by the court in setting a fine to the length and breadth of the nuisance proved, and not to that set out. The same point was determined in *Rex v. Brookes*, *ib.* 168, and again in *Rex v. the inhabitants of East Lidford*. Besides, I cannot see how this precision can be expected, as to the description of water overflowing a road. It is not analogous to the case of a fence thrown across a road,

whose height and length, while it continues, are uniformly the same. Here the water is evanescent, after having reached its height, decreasing by the falling of the stream, evaporation, &c. And it is sufficient for us. that the indictment pursues precedents in cases of the like nature, as may be seen in Stubb's Cro. Circ. Compa. 495, 4th ed. 296.

The second reason is, that the place in which the nuisance was stated to be committed, is in the commonwealth's highway, *or* a road leading from the town of Bedford, in the county aforesaid, towards and unto the crossings of Juniata, in the same county; and the same being thus described in the disjunctive cannot be supported, more especially as it is uncertain whether the said road is a public highway or private road.

It was objected, that an indictment in the disjunctive, as that the defendant forged *or* caused to be forged, &c. is bad, though if laid in the conjunctive, the party must come prepared against both charges. 1 Salk. 342, 371. 2 Stra. 900. 1 Burr. 400. 5 Mod. 137. Annal. 370. 1 Barnard. B. R. 347. 2 Sess. Cas. 25. 2 Law. c. 25, § 58. The laws of this state recognize private as well as public roads; and as it cannot be denied, that an indictment must be precise and certain as to all points, the defendant could not be prepared here in his defence as to a nuisance, which might as laid, be either in a public or private road.

To this it is answered, that this indictment cannot be said to be laid in the alternative. Indeed, Lord Mansfield thought there was no reason for this nicety in indictments. It makes no difference to the defendant, whether the charge is in the disjunctive or conjunctive. The substance is exactly the same. 1 Burr. 400.

But in all the cases, wherein this objection has been taken, it has gone to the act itself, where the very offence was described in the disjunctive, as forged *or* caused to be forged, murdered *or* caused to be murdered, beat *or* caused to be beaten, conveyed *or* caused to be conveyed, &c.; and the ground is, that the offences being distinct, and it not appearing of which specific offence the indictors had accused the defendants, such indictments were held vicious. Here the defendant is charged positively with obstructing and stopping up ancient water courses, by reason whereof the commonwealth's highway *or* road leading from Bedford to the crossings became impassable, &c.

The word road, used generally in our laws, is uniformly applied to public roads, unless where the diminutive private is added thereto. It is synonymous with the term highway. By the act of assembly of 1700, 1 St. Laws 16, § 1, the governor and council for the time being, shall lay out all the king's ways *or* public roads, which shall be re-

corded in the council books. The 2d section gives jurisdiction to the justices of each county court to lay out a road or cart-way into the public road, but which in practice has been extended to all public roads whatever. The 4th section provides, that if any person shall presume to stop or hinder any of the said highways or other roads, he shall be fined 5*l.*, part thereof shall be employed in repairing and clearing other roads, &c.

The preamble to the act of 20th February 1735-6, recites that it was provided, that all roads laid out by the directions of the act of 1700, should be public highways, and the 1st section gives jurisdiction to the courts of Quarter Sessions, to lay out private roads. 1 St. Laws 289.

The act of 21st March 1772, (1 St. Laws 623) made perpetual by the law of 1st March 1800, (4 St. Laws 563) recites in the first section, that whereas the laws for keeping in repairs the roads and highways have been found burdensome, &c., and insufficient for making effectual repairs in the said roads, it directs that supervisors refusing or neglecting to take upon them the office when elected, shall forfeit 10*l.* to be applied towards repairing the said roads. In other parts of the act, highways and roads conveyed the same precise idea.

So in the law of 8th February 1785, (2 St. Laws 237) entitled "an act to enable the courts of Quarter Sessions of the several counties in this commonwealth to vacate roads and highways, in proper cases." In the 1st section, the general words roads and highways occur no less than four times; and in the last, the public nature of them is clearly expressed. In § 2 and 4, the terms highways and roads are used as descriptive of the same way. So also in § 1, of the act of 21st September 1715, (2 St. Laws 388.)

The law of 29th March 1787, (2 St. Laws 515) empowering the appointment of commissioners to lay out a state highway between the Frankstown branch of Juniata and Conemaugh, is entitled "an act for opening and establishing a road between those waters; and it is so styled in the preamble, and likewise in § 3.

It would be a waste of time to recapitulate various other laws, wherein it appears, that where no epithet is applied to the word road, it is uniformly taken as a public highway. And such is the common as well as legal acceptation of the word road.

Again. In *Rex v. Brooks*, (Sayer 167) the indictment charges the defendant, that "he dug two gripps or ditches in a certain passage or footway, one of which was in depth 6 feet and in width 12 feet, the other in depth 6 feet and in width 13 feet, to the nuisance of all the

king's subjects." It was there said that the passage or footway was not alleged to be a common way for all the king's subjects ; and that an indictment will not lie for a nuisance in a way, unless the way be common for all the king's subjects. But the gripps or ditches in the passage or footway are alleged to be to the nuisance of all the king's subjects, which in Thrower's case. (1 Vent. 208. 3 Kib. 28) was holden to be a sufficient allegation, that the way wherein the nuisance was alleged to be, was a common way for all the king's subjects.

Thrower was indicted at the sessions of the peace for Ipswich, for stopping *communem viam pedestrem ad ecclesiam de Weitby*. On a motion to quash the indictment, Lord Chief Justice Hale said : " If there were alleged to be *communis via pedestris ad ecclesiam pro parochianis*, the indictment would not be good ; for then the nuisance would extend no further than the parishioners, for which they have their particular suits ; but for aught appears, this is a common footway, and the church is only the *terminus ad quem*, and it may lead further, the church being expressed only to ascertain it ; and it is laid *ad commune nocumentum*. Wherefore," &c.

The whole texture of these indictments plainly evinces, that the word road used therein, means *ex necessitate rei* a road and common highway. Besides, the expressions commonwealth's highway, give a clear appropriate idea, and the first word must be carried through the whole sentence. It is laid, that " by reason of the obstruction and stopping up of the water course, the rain and waters overflowed and remained in the commonwealth's highway or road, and thereby the same was and yet is greatly hurt and spoiled, so that the liege subjects of the commonwealth through the same highway or road, with their horses, coaches, carts and carriages could not, nor yet can go, return, pass, ride and labour, as they ought, and were wont to do." And it concludes : " To the great damage and common nuisance of all the liege subjects of the commonwealth, through the same highway or road going," &c.

Upon the whole, I am of opinion that the reasons offered on the part of the defendant, are not sufficient to arrest the judgment for the commonwealth, on both convictions.

Judgment, that the defendant on each conviction, pay a fine of 5l. to the supervisors of the highways of Colraine township, to be employed for the clearing and removing the nuisance, and for the use of the roads within the same township, and pay the costs of prosecution ; and that the sheriff do forthwith abate and alter the dam so as to

bring the same within the limitations of the act of assembly of 29th March 1802. 5 St. Laws 122.

Lessee of ISABELLA M'INTIRE *against* WILLIAM WARD, esq.

A deed by husband and wife, joint-tenants, executed in Maryland, and acknowledged before two justices of the peace and of the Common Pleas at Baltimore, with a certificate under the county seal that there were at that time no superior magistrates or peace officers in the county, allowed to be read in evidence.

EJECTMENT for two messuages, &c., and 655 acres of land in Bedford township.

The lessor of the plaintiff deduced a title to herself under two warrants and surveys, to her father, Robert Callender, who on the 7th June 1773, conveyed the premises to her first husband, William Neil and herself, as joint-tenants in fee. Neil died, and she afterwards intermarried with Thomas M'Intire, whom she survived.

The defendant's counsel offered in evidence a deed from the said William Neil and Isabella his wife, to Samuel Todd in fee, in consideration of 1000l. dated 17th February 1779. The grantors then lived in the town of Baltimore, and acknowledged the conveyance before James Calhoun and Peter Shepherd esqs. justice of the peace of Baltimore county, but the seals of the justices were not affixed thereto. Three certificates by William Gibson, clerk of Baltimore county, under his seal of office, were annexed to the deed; the first dated 18th February 1779, showing that Calhoun and Shepherd were justices of the peace; the second dated 7th June 1802, showing that they were at the execution of the deed, justices of the Court of Common Pleas of Baltimore county; and the third, dated 30th September 1802, certifying that in February 1779, they were principal magistrates and justices of the Court of Common Pleas of Baltimore county, and that in 1779, there were no superior magistrates or peace officers in the said county.

Messrs. Duncan and C. Smith, excepted to the reading of the deed. The court will not model the rules of evidence from the supposed hardship or necessity of any particular case. The only question is, what have the legislature done, and how far have they altered the rules of evidence at common law. The act of 1715, does not provide for the present case. The direction in the 4th sect. 1 St. Laws, 110, where deeds have been made out of the province, goes only to the proof of their execution, by one or more of the witnesses, before any mayor, chief magistrate or officer of the cities, towns or places where the deeds were made.

The present case is the grant of the estate of a feme covert, which in England could only be, by levying of a fine. A due conformity to the law of 24th February 1770, alone could divest the interest of the lessor of the plaintiff. To give validity to the conveyance of the lands of a feme covert, the husband and wife must acknowledge the deed in a certain specified form before a judge of the Supreme Court, or any justice of the Court of Common Pleas of the county where the lands lie. But if the deed was made by a husband and wife not residing within this state, the acknowledgment thereof being taken and made in the manner therein specified, "before any mayor, chief magistrate or officer of the cities, towns or places where such deed shall be made or executed, and certified under the common or public seal of such cities, towns or places, it shall be valid and effectual."

1 St. Laws, 536, 7. The certificate of the mayor of a city or chief magistrate of a corporate town, is here evidently contemplated, by calling for the common or public seal. Though Baltimore was not incorporated as a city in 1779, yet it is well known, that there were justices of the Supreme Court in Maryland, both of the eastern and western shore, at that period. And the act of the county clerk cannot prove, that there were then no superior magistrates.

Messrs. Hamilton and Watts for the defendant, insisted, that the acknowledgment in 1779, could have been in no other mode, than that which has been adopted. Baltimore was then no corporate town, and had no chief magistrate. It is fully certified, that there were no superior magistrates or peace officers within the county. Of what moment is it, that there were justices of the Supreme Court in Maryland at the time, if they did not reside in the place where the deed was executed, agreeably to the terms of the law of 1770? The word officer does not necessarily refer to a corporation, nor seems to be so intended. The words of the act, *reddenda singula singulis*, must be read, "before the mayor of a city, chief magistrate of a town, or officer, of the place where such deed was made," &c. If there is a public or common seal, it must be affixed to the acknowledgment; but if there is not, the private seal of the officer must be sufficient. The act must be so construed as to promote the general utility and public convenience, duly guarding against all frauds. A deed executed in England, and acknowledged here, though not recorded, was allowed to be read in evidence. 1 Dall. 66.

By the court. It is an important circumstance in the present case, that the town of Baltimore possessed no mayor, or chief magistrate in 1779. The words of the act are "before any mayor, chief magistrate or officer of the cities, towns or places, where the deed was made," &c. If it should even be admitted, that the terms of the law have not been literally pursued, the acknowledgment is the same in substance, as if it had been taken by any mayor, &c. The Supreme Court has received in evidence the records of courts in North Carolina and Georgia, without public seals, where it has been proved, that none such existed. Under the circumstances of this case, we do not feel ourselves authorized to refuse the deed in evidence, though we do not deem it necessary to express any opinion of its legal operation.

The plaintiff's counsel expected to the opinion of the court; but some difficulties arising, concerning the time when William Neil died, and the improvements made on the premises since, concerning which the counsel were not prepared with testimony, it was mutually agreed, that the jury should be discharged without giving a verdict.

This cause came on again to trial on the 17th November 1803, together with another suit, between the same plaintiff and Thomas Feree and Robert Cameron, depending on the same title. To the certificates before produced by the defendant, annexed to the deed objected to be received in evidence, another certificate was added by Ninion Pinckney, esq., clerk of the Executive Counsel of Maryland, under the great seal of the state, dated 8th November 1802, certifying, that in the year 1779, there were no magistrates or peace officers in Baltimore county, superior to James Calhoon and Peter Shepherd esqrs.

The argument respecting the admission of the deed from Neil and wife to Todd, was again fully gone into; and Yeates, J. delivered the opinion of the court, to the following effect:

We are bound to construe the law of 24th February 1770, according to the true intention of the legislature. The act of 1715, respects the proving of deeds; out of the state; that of 1770 the acknowledgment of deeds, granting the estates of *femes covert*. The words of the latter law, must be construed, *reddendo singula singulis*. "Mayor" refers to "cities," "chief magistrate" to "towns," "officers" to "places." What definite idea have we of places as contradistinguished from cities and towns, unless the term embraces such a case as the

present? Must they necessarily relate to corporations? It cannot be supposed, that a public seal is necessary, where there is no such thing.

The law intended to facilitate the transfers of lands out of the state.

But if the plaintiff's doctrine obtains, no deeds executed out of the state can be put on record unless made in a corporate place, or acknowledged or proved within the state. Necessity must justify the acts it imposes. The vendee has done all he could be reasonably expected to do. Extracts of records of courts, which have no public seals, have been given in evidence repeatedly and without hesitation.

On the whole, we see no reason to alter the opinion we delivered on the former trial, but adhere thereto, by allowing the deed to be given in evidence to the jury.

The plaintiff's counsel then tendered a bill of exceptions, which the court sealed, and the jury gave their verdicts for the defendants.

Lessee of Dr. ROBERT JOHNSON *against* CHRISTOPHER ECKART.

Vendor of an improvement right without warranty, may be a witness to the title in an ejectment.

EJECTMENT for 170 acres of land in Air township.

The plaintiff claimed under a patent.

The defendant claimed under a warrant and survey, and under an improvement right derived from Adam Linn and John Linn. The latter had given a bill of sale of this improvement to Daniel Besshore, dated 30th March 1790, in consideration of 3*l*. without any covenant of warranty.

The deposition of John Linn, taken in pursuance of a rule of court, was offered in evidence by the defendant to establish his improvement right.

This was objected to by the plaintiff's counsel. It will be highly dangerous and inconvenient to permit persons to receive money for lands, and allow them to be sworn afterwards in defence of the title they have sold. Perjury must be the result. Besides, Linn is in fact swearing in his own cause; because, if the lands are recovered from the defendant, he may oblige Linn to repay back the 3*l*. as received without consideration.

Sed per curiam. It has been long settled, that a vendor who

has made no covenant for good title or warranty, may be allowed to prove the title of the vendee. 1 Stra. 445. The Supreme Court has, in so many instances, adopted the principles of evidence, laid down in the case of *Bent v. Baker et al.* that they cannot now be questioned. 3 Term Rep. 27. Courts of justice endeavor, where they legally can, to restrain objections to the credit, rather than the competency of witnesses, and the ends of justice are best promoted thereby. The only difficulty here is, whether the verdict in this cause may at a future day be given in evidence for or against the witness; (*Ib.* 32, 34, 36, 309, 310) and we incline to think it cannot at the present moment. Should it hereafter appear that we are mistaken in admitting the evidence to go to the jury, and a verdict should pass for the defendant, we will grant a new trial without costs.

Verdict for the plaintiff.

Messrs. Duncan and Brown, *pro quer.*

Messrs. Hamilton and S. Riddle, *pro def.*

GEORGE FUNK *against* PETER ARNOLD.

Nuisance in obstructing the waters in D creek, by which plaintiff's lands were overflowed; the nuisance was by erecting a dam in the waters of J. Variance held fatal.

THE plaintiff declared, that the defendant had obstructed the waters of Dunning's creek, by raising a dam therein, and overflowing the plaintiff's lands.

It turned out in evidence, that the dam was erected in the Ray's town branch of Juniata, near the mouth of Dunning's creek, where it falls into Juniata, and the court ordered the plaintiff to be called on account of the variance.

Plaintiff nonsuit.

Messrs. Hamilton and Dunlop, *pro quer.*

Messrs. Duncan and Clark, *pro def.*

MEMORANDUM.

The report of the case of the attorney general and the grantees, under the acts of assembly of 3d April 1792, would follow here; but the author having furnished Mr. Dallas with his report of the case, which is printed *totidem verbis* in 4 Dallas 237, it is therefore omitted in this publication.

DECEMBER TERM, 1802.

CORAM—SHIPPEN, CHIEF JUSTICE, YEATES AND SMITH JUSTICES.

RESPUBLICA *against* BENJAMIN GIBBS, junior.

[S. C. 4 Dall. 253.]

Under the election law of 15th February 1799, the inspector has no right to exact an oath of a citizen claiming to vote, that he did not join the British forces during the late war, or was not attainted of high treason.

The maxim, no one is bound to accuse himself, extends to such cases where the answer may involve one in shame or reproach.

To constitute the offence of intimidation, threats, violence or inturruption, under the 17th section of the election law, there must be a preconceived intention for the purpose of intimidating the officers, or interrupting the election.

AN indictment was found against the defendant, and removed by him from the Mayor's Court into this court.

It contained five counts ; the first three of them, under a law passed 15th February 1799, (4 St. Laws 332,) "to regulate the general elections within this commonwealth ;" the two last at common law. The first count charged the defendant with designing and intending to obstruct the due execution of the laws, and that he on the 13th October 1801, at the city of Philadelphia, did threaten and use violence to one John Beckley, then and there being one of the judges of the election, and in the due execution of his office, and with threats and opprobrious language, did interrupt the said John Beckley in the execution of his duty. The second count charged him with threatening and using opprobrious language to the said John Beckley one of the judges, &c., thereby designing and intending to interrupt the election. The third count contained some alteration of the first, and varied the charge as to the mode of interrupting Beckley in the execution of his office. The fourth count charged an assault on Beckley as a judge of the election, in the execution of his duty. And the fifth charged an assault on him generally.

The facts in evidence appeared as follow :

Benjamin Gibbs, the elder, the father of the defendant, a blind and aged man, entitled as an elector, (both as a native and resident above thirty years, who had paid taxes many years,) was led to the election ground by his son, and offered his vote. He was told, that previous to his vote being received, he must answer upon oath or affirmation the following questions, to wit: "Did you at all times, during the late revolution, continue in allegiance to this state, or some other of the United States? Or did you join the British forces, or take the oath

of allegiance to the king of Great Britian ; and if so, at what period? Have you ever been attainted of high treason against this commonwealth; and if you have, has the attainder been reversed, or have you received a pardon? ”

Old Gibbs thereupon asked, by what authority or law these questions were put to him, and was informed by the inspector of the ward, that they were proper, and unless he took the oath or affirmation thereon, his suffrage would not be received. The aforesaid John Beckley was then called upon and proposed the questions, saying the measure had been agreed upon by the judges of the election. Gibbs, senior, enquired of him by what law they were justified, and observed, that unless the questions were authorized, the law was paramount to their judgment. The necessity of answering the questions was again repeated, and Gibbs, by the advice of a friend, at length took the affirmation required of him, and answered the questions proposed, and then was permitted to give his suffrage. But previous thereto, both he and his son used intemperate language and insulting expressions. The defendant in particular said they were all a set of villains and scoundrels, and holding up his fist to Beckley in an angry and threatening manner, said he would see him at another time. One of the witnesses, swore, that the defendant was within reach of Beckley when he held up his fist, but two others who were present also, swore that he was distant from him three or four yards, and did not seem as if he intended at the time to strike. The election was interrupted for some time by the violent and intemperate conduct of the father and son, and a tumult arose. It appeared that the same questions were asked of other electors at other windows of the court house, who were alleged to have been on what was called the black list of suspected persons, said to have been copied from Towne's Evening Post, of persons prescribed by the executive authority of this commonwealth.

Messrs. Ingersoll and Lewis for the defendant, after premising that every question concerning the right of suffrage was peculiarly interesting to the citizens of a representative government, made two points.

1st. The conduct of the judges and inspectors of the election was illegal, when they exacted answers to their questions, before they would admit the parties to vote ; and if any interruption was occasioned thereby to the election, it arose from their own improper conduct. And,

2d. Though the defendant may not be justifiable in all he has said or done, still he cannot be convicted on any count in this indictment.

1. The law of 13th June 1777, first directed, that all persons who had not taken the oath or affirmation of allegiance to the state, should be incapable of electing or being elected. Loose

Acts 38, § 4. And those disabilities were confirmed and declared by the act of 1st April 1778, to continue during the life of the delinquent or offender. Ib. 129, § 7. The law of 6th March 1778, attainted divers persons of high treason, if they did not render themselves by a certain day. 1 Dall. St. Laws, 750. By the 11th section of the act of 5th December 1778, persons who had taken the oath of allegiance to this state, before the 1st June then last past, and had since taken the oath or affirmation of allegiance to the king of Great Britain, were declared capable of electing and being elected, upon taking the oath or affirmation therein prescribed. Loose acts 174. And by the 2d section of the act of 4th March 1786, persons who had neglected to comply with the former test laws, were admitted to full citizenship, on taking the oath or affirmation specified therein. Ib. 35. Another more comprehensive law was passed on the 29th March 1787, whereby it is declared, that all persons shall, on taking a general oath or affirmation of allegiance to the state, without any renunciation of the king of Great Britain, his heirs and successors, or any retrospective clause whatsoever, enjoy all the rights and privileges of citizenship. Loose laws 304. By another law passed 13th March 1789, all former laws requiring any oath or affirmation of allegiance from the inhabitants of this state, were repealed; and all persons who were excluded by former laws from certain privileges, were restored to the full rights of citizenship; and every foreigner thereafter coming to settle within the state, shall be entitled to enjoy all the rights and privileges secured to him by the 4th section of the plan or frame of government. Ib. 43. 2 Dall. St. Laws, 676. This was a general act of amnesty and oblivion, wisely calculated to heal all political animosities. Even the legislature would have no right to revoke the privileges and franchises, thus firmly vested in individuals by a solemn legislative contract and declaration.

The constitution of Pennsylvania, formed on the 28th September 1776, directs in the 9th section of the declaration of rights, that "no man can be compelled to give evidence against himself;" and the same words are repeated in the 9th section of the 9th article of the constitution of 1790. But it will be objected, that giving answer to the questions proposed by the judges and inspectors of the election, is not giving evidence by the party, to charge him with a crime now punishable by law. It will be remembered, that though corruption of blood, on an attainder of high treason, is taken away by the last state constitution, it followed under the constitution of 1776. It is true, that by the 6th article of the treaty of peace of 3d September 1783, between the

United States and Great Britain, it is stipulated, that "there shall be no future confiscations made nor any prosecutions commenced against any person or persons, for or by reason of the part, which he or they may have taken in the war; and that no person shall, on that account, suffer any future loss or damage, either in his person, liberty or property," &c. 1 U. S. Law, 483. But though, since the peace, Gibbs the elder could not be executed on a previous attainder of high treason, if such was really the case, nor any future confiscations flow from thence, would not his blood be corrupted thereby? Would not the disabilities immediately consequent thereon attach to him, and he be rendered incapable of being a witness or juror; of bringing a suit; of electing or being elected; of taking by descent or purchase? And are these no pains or penalties? Moreover, it is contended, that the true meaning of the constitution and law is, that no question shall be asked a person, the answer to which may tend to charge him either with a crime, or bring him into disgrace or infamy. Is the commission of high treason no offence against good morals, as well as the highest political crime? Does not a man's admission, that he has received a pardon on such attainder, induce merited shame and reproach? Thus saith the law. *Nemo tenetur prodere (aut accusare) seipsum.* 3 Bulst. 50. For it is against the very law of nature. Styl. Pract. Reg. 582. (675.) A juror may be examined on oath of *voir dire*, wite regard to causes of challenge, which are not to his dishonour; but not with respect to the head of challenge *propter delictum*, which would be to make him either forswear, or accuse himself if guilty. 3 Bl. Com. 364. A person shall not be asked whether he is a Roman Catholic. Doug. 572. A witness or juror shall not be asked, whether he was whipped for felony, or committed on a charge of coining. Salk. 153. 4 St. Tri. 747. The present constitution of Pennsylvania declares in article 3, section 1, 3 Dall. St. Laws XXVIII. "In elections by citizens, every freeman of the age of twenty-one years, having resided in the state two years next before the election, and within that time paid a state or county tax, which shall have been assessed at least six months before the election, shall enjoy the rights of an elector." This is a paramount law, declaring the qualifications of the electors, and to these only can proper questions refer viz. citizenship, full age, two years residence, and the payment of a state or county tax.

The act of 15th February 1799, was passed in strict conformity thereto, and directs the specific questions; and it may be observed, that though the first section of the law runs in the affirmative, yet the 5th section clearly implies a negative. 1 St.

Laws 332. In the present instance, no difficulty could possibly exist as to Gibbs the elder being born within the state, his advanced age, his residence on the 28th September 1776, his living in his own house in the city, and his payment of state and county taxes for many years. This self-created inquisitorial tribunal, claiming a right to examine him on affirmation, as to matters which might involve legal incapacities, and subject him to shame and reproach, was an arbitrary assumption of power, and a flagrant outrage on the rights of electors.

The remark of Lord Chief Justice Holt in *Rex v. Tooley et al.* 2 *Ld. Raym.* 1301, seems applicable to this case: "Where an act is done under a color of justice, and where the liberty of the subject is invaded, it is a provocation to all the subjects of England." The assertion that the name of Gibbs the father, was found in the list of persons proscribed by the government, is a mere pretext; and we confidently assert, that it was unfounded; with this also, that no legal opinion was ever obtained, justifying the practice contended for. The slight interruption which took place during the election, must be ascribed to the illegal conduct of the judges and inspectors and cannot be imputed to the defendant. The high commission court in England, which was afterwards abolished by stat. 16 Car. 1, c. 11, fell into disrepute, from forming themselves into a court of inquisition, in which all persons were obliged to answer, in cases of bare suspicion. 3 *Bl. Com.* 447. See also Junius's 2d letter to Lord Mansfield 38, 39,

2. But admitting that the defendant's conduct may not have been strictly correct in every particular, he cannot be convicted on either of the counts in the present indictment. The three first counts are framed on the 17th section of the act of 15th February 1799. After providing that all elections shall be free and voluntary, and directing how electors shall be punished, who take rewards for their votes, it declares that "if at any election to be holden under the act, any intimidation, threats, force or violence, shall be used or practised with design to influence unduly, or to overawe such election, or to restrain the freedom of choice, or if any officers of the election shall be threatened, or violence used to his person, or interrupted in the execution of his duty, every person who shall be guilty of such intimidation, threats, violence or interruption, being convicted thereof, shall be fined and imprisoned for the same, at the discretion of the court, not exceeding six months imprisonment, nor exceeding one hundred dollars fine," &c. It is therefore essential, that the acts done shall be with a view to influence unduly, or interrupt the election; and so are the counts of this indict-

ment framed. It will not be sufficient, that an interruption took place, in consequence of a sudden and unpremeditated act or speech, springing from sources not contemplated by the law. Penal acts must be construed strictly. And it must be admitted that this section is highly penal. Let a few instances be put by way of illustration. Suppose an affray to commence in an adjoining square, on grounds wholly foreign to the election, which in its progress should reach the place of election, and thereby cause a temporary obstruction, will this be within the act? Or suppose blows given and returned on a sudden provocation, arising from private differences, at the time and place of election. Can these acts however unjustifiable, be deemed to merit so severe a punishment, as must be the necessary consequence of a conviction under this act? It is presumed not. Here the defendant went to aid an infirm and blind father, who was desirous of exercising the rights of a freeman, without any design of influencing or interrupting the election, and the intemperate warmth which took place from the conduct used towards his father, was merely accidental. As to the assault laid in the two latter counts, in order to constitute it, the adverse party must be within reach. Bull. Ni. Pri. 15. It was submitted to the jury that the weight of the evidence on this point, as well as the circumstances attending the case were greatly in favor of the defendant.

Messrs. Jo. Reed and Dickerson for the commonwealth. This cause has assumed a more important shape than was at first apprehended. The right of suffrage is perfectly distinct from violence and threats used in support of it. But though the legal point is not necessarily connected with the matters of fact, which the jury are called on to decide, the counsel will not shrink from the investigation.

It is apprehended, that the proposing of the question to electors under suspicious circumstances, was not unlawful. The oath of each inspector and judge of the election, is prescribed by the 5th section of the act of February 1799. The former is sworn or affirmed, that "he will not receive any ticket or vote from any person or persons, other than those he shall firmly believe are entitled to vote according to the provisions of the act, without requiring such evidence of their right to vote, as is directed to be given by the act." And the latter, that he will not give his consent, that any vote or ticket shall be received from any person or persons, other," &c. Though certain inquiries are directed to be made in the first section, yet there being no negative words, the judges and inspectors are not

necessarily confined to them. They must firmly believe that the elector is a citizen, or a foreigner under certain qualifications, before they should admit him to a vote. Whether a person is a citizen or not, who offers himself to vote as such, they have certainly a right to examine; and though Gibbs, senior, was a native of Pennsylvania, yet he might have elected during the struggle for independence, to continue a British subject; and he had an undoubted right to take his side during the civil war, until the 11th February 1777, without blame on that score, or being involved in high treason. 1 Dall. '58, 59, *Republica v. Chapman*. But after making such election, he would no longer be a citizen of the state. If he continued an inhabitant of the state and became attainted of high treason, he forfeited all right of citizenship, and became incapable of voting, unless he had received a pardon. The judges and inspectors of the election were not bound to obtain copies of the records of the late Supreme Executive Council, or of the courts of Oyer and Terminer, either at their own, or the public expense; but they were bound by oath, to permit only real citizens to vote in that character. They must therefore be allowed to inquire into the citizenship of the person claiming to vote, by all the means in their power. If Samuel Chapman, in 1 Dall. 53, had offered to vote, his pretensions and disqualifications were proper subjects of inquiry. The burthen of proof of being entitled to vote, rests on the voter; and by his claim of the privilege, he subjects himself to the necessity of answering such questions, as may tend to show that his claim is well founded. No compulsion is practiced on him. His own act invites the examination. If he is under legal disqualification, it rests generally in his own breast, and can only be discovered by his answers upon oath. When it is said, that no one is bound to accuse himself, it cannot be supposed to apply to a person offering to vote, with a criminal intention of deceiving the inspector. But we take the rule to be, that such questions only are forbidden to be put, which may involve a man in guilt, or a penalty. Here the treaty of peace in 1783, took away all penalties for acts done during the war. 1 Dall. 233, *Republica v. Gordon*. And yet there are not wanting cases to show, that such questions as are now complained of, have been put in courts of justice. In the case of the Attorney General *v. Mr. Du Plessis* and others, where an information was exhibited to assert the king's title to the lands of a woman charged to be an alien, she cannot demur to the discovery, whether she is an alien or not, because the disability of an alien to hold to lands, is not a penalty or forfeiture. Parker 144, 163. One offering himself as bail was asked by the court, whether

he had not stood in the pillory for perjury. 4 Term. Rep. 449.

Here though the defendant had no control whatever over the officers of the election, he attempted to direct them in the exercise of their duties, and that too with threats and violence, accompanied with the most unbecoming language. The legal point, whether the questions might be put with propriety, was at least *dubious*; and he had no right to use such conduct to persons acting conscientiously, in the discharge of the most important truths. The great security of the sacred right of suffrage, consists in preserving the election ground in a peaceable state, freed from all tumult and disorder, and no individual can assume the power of dictating his own decisions in a turbulent manner. If protection is not afforded to those who superintend elections, manifest confusion must ensue, and no peaceable person will take on himself the office of a judge or inspector.

The intentions of the defendant can only be ascertained by his acts. His conduct was highly intemperate. His language was grossly scurrilous. To Beckely, one of the judges, he held up his hand, clenched in an angry and menacing attitude, within reach of him, (as one of the witnesses has deposed,) and vowed, that he would have satisfaction of him at a future day. What then could he intend, but to influence, overawe and interrupt the election? If his turbulent and disorderly conduct is to be justified, because he interfered in the case of an aged father, a precedent will be established, and the same right will be assumed in the case of a brother or seventh cousin; and the freedom of election will be placed in the most imminent danger.

Shippen, C. J. delivered the charge of the court, in substance, as follows:

The case before us is of great moment. It involves in it the important rights of electors, as well as the preservation of the purity and peace of elections. It has been fully argued by the counsel on both sides, and nothing remains for us, except to narrow the bounds of disquisition, and pronounce our opinion of the law resulting from the facts. The three first counts in the indictment are grounded on the act, to regulate general elections, passed on the 15th February 1799. This law pursues the language of the first section of the 8d article of the present state constitution, in the enumeration of the qualifications of electors as citizens, and prescribes rules and terms under which the suffrages of foreigners shall be received.

The qualifications in the first instance are citizenship, by being born within the state, or being settled therein on the 28th Sep-

tember 1776, (when the first state constitution was formed;) being of full age, residence within the state two years next before the election, and payment within that time of a state or county tax, which shall have been assessed at least six months before the election; with a provision, in favor of the sons of qualified citizens, between the ages of 21 and 22 years, who have not paid taxes. "Every citizen having paid taxes and resided as aforesaid, and claiming a right to vote, shall make proof thereof," &c., are the words of the first section, of the act; which compared with the words of the fifth section, show that no other questions can be put to the electors, than may tend to show whether they are possessed of these qualifications. The rule of law holds in this case, that *expressio unius, est exclusio alterius*.

Besides, it has been objected, that the questions propounded to the electors, contravene an established principle of law. The maxim is *nemo tenetur seipsum accusare, (seu prodere.)* It is founded on the best policy, and runs throughout our whole system of jurisprudence. It is the uniform practice of courts of justice as to witnesses and jurors. It is considered cruel and unjust to propose questions which may tend to criminate the party. And so jealous have the legislature of this commonwealth been, of this mode of discovery of facts, that they refused their assent to a bill brought in, to compel persons to disclose on oath, papers as well as facts, relating to questions of mere property. And may we not justly suppose, that they would not be less jealous of securing our citizens against this mode of self accusation. The words *accusare* or *prodere* are general terms, and their sense is not confined to cases, where the answers to the questions proposed would induce to the punishment of the party; if they would involve him in shame or reproach, he is under no obligation to answer them. The avowed object of putting them is to show, that the party is under a legal disability to elect or be elected; and they might create an incapacity to take either by purchase or descent, to be a witness or juror, &c. We are all clear on this point, that the inspectors were not justified in proposing the questions objected to, though it is probable they did not wrong intentionally. Nevertheless, if by exacting an illegal oath, the election was obstructed or interrupted, it seems most reasonable to attribute it to them.

Another ground of defence has been taken. It is said, that the intimidation, threats, violence or interruption must be the effects of intention. And that so far from there being a design to overawe or obstruct the election in the present instance, it appears by the evidence, that the affair was sudden and unpremeditated; and that the improper warmth of the defendant took its rise from some harsh expressions used.

by the inspector towards his father. The severe penalty annexed to the offence shows in what light the legislature have viewed it. Our code of laws is generally mild and lenient, and their intention could not have been to have subjected a slight undesigned interruption of an election to so rigorous a punishment. To constitute the offence, it would seem that there should be a pre-conceived design and intention to intimidate the officers, or interrupt the election, and the three first counts of this indictment lays the offence to have been committed with suchde sign and intention. It must be admitted, that the conduct of the defendant was highly intemperate and blameable, but if it sprung from the passion of the moment, under an impression that his father had been hardly treated, and not from an intention of interrupting the election, he does not seem to be within the meaning of the law.

With respect to the two last counts in the indictment for the assault on John Beckley, there is a contrariety of evidence. The jury must determine the fact for themselves, whether the defendant was within reach of him, when he held up his hand clenched, in an angry and menacing manner, and the verdict should correspond with the fact so found. Unless Beckley was within his reach, he cannot be guilty of the assault.

The questions before the jury are of great importance. We trust that party considerations will have no weight in their decision of them. The court have laid down this as an undeviating rule of conduct for themselves, and flatter themselves they have evinced their adherence to it on more than one occasion.

Verdict not guilty.

ANDREW BAYARD and ANDREW PETIT *against* THOMAS PASSMORE.

The publication of a paper to prejudice the public mind in a cause depending, is a contempt, if it manifestly refers to the cause, though it does not expressly appear on the face of the writing. But however libellous the paper may be, the court can have no cognizance of it in a summary way, unless it be a contempt.

A RULE to show cause why an attachment should not issue against the defendant, for a contempt in making a certain publication, was obtained at the last term, on the following affidavits.

James Kitchen made oath, that on the 8th September 1802, Thomas Passmore affixed the paper annexed to his affidavit, (a copy of which hereafter follows,) to a board in the exchange room in the city tavern, and wafered the same to the board, in the manner advertisements are usually posted up.

Andrew Bayard made oath, that the paper annexed was written by Thomas Passmore ; that the contents of the said paper relate, as the deponent believes, to a suit depending in this court, wherein the said Thomas is plaintiff and Andrew Petit and this deponent are defendants ; that the affidavit taken before John Inskeep, esq. in order to substantiate the exceptions to the report in the said suit is the oath taken by this deponent, to which the said paper refers ; and this deponent has no suit, controversy or dispute with the said Thomas Passmore, other than what arises from the said suit depending in this court.

The paper published was in these words : “ The subscriber publicly declares, that Petit and Bayard of this city, merchants and quibbling underwriters, has basely kept from me the said subscriber for nine months about 500 dollars, and that Andrew Bayard, the partner of Andrew Petit, did on the 3d or 4th instant go before John Inskeep, esq., alderman, and swore to that which is not true, by which the said Bayard and Petit is enabled to keep the subscriber out of his money for about three months longer, and the said Bayard has meanly attempted to prevent others from paying the subscriber about 2500 dollars, but in this mean and dirty action he was disappointed in ; I therefore do publicly declare, that Andrew Bayard is a liar, a rascal and a coward, and do offer two and a half per cent. to any good person or persons to insure the solvency of the said Bayard and Petit for about four months from this date. Philadelphia, September 8, 1802. (Signed) Thomas Passmore.”

The defendant now appearing in court, in pursuance of the rule, the following facts where shown.

An amicable action was entered in this court on the 6th August 1802, by Passmore against Bayard and Petit, and on the next day was referred to Hugh Henry and Matthew Pearce for decision, who in case of disagreement, were authorized to call in a third person. The suit was brought on a policy of insurance underwrote by Petit and Bayard, and the other underwriters, by their agreement of the 12th July preceding, engaged to abide by the event of that suit. The two referees not agreeing in opinion, chose William Hazelet as the third man ; and he and Henry made a report in favor of Passmore for 490 dollars, which was filed on the 6th August 1802. A *fieri facias* issued thereon returnable to last September term ; but the same was stopped on the following exceptions being filed on 3d September last, which were verified by the oath of Andrew Bayard, before John Inskeep, esq., one of the city aldermen. 1st. The defendants were not notified of one of the

meetings of the referees. 2d. The affidavit of the plaintiff of what a person had said' was shown to the referees in the absence of the defendants. 3d. The referees had allowed a claim for a total loss, though no account of expenses was produced to them. 4th. The referees had found for the plaintiff, instead of reporting in favor of the defendants. Upon these exceptions, a rule was entered to show cause why the report should not be set aside, and the publication complained of was made on the 8th September following.

Mr. Moses Levy in behalf of Passmore, now contended, that a contempt will not be presumed in a dubious case. There are several matters in the obnoxious publication which do not relate to the suit in this court; nor does it appear by the publication that any cause was depending upon which it was founded. It must be criminal on the face of the paper, and there must be a manifest allusion to a *lis pendens*. At the most, this goes to prejudice the minds of the judges, before whom the exceptions must be argued; and it is a work of more difficulty to prepossess a court than a jury.

Messrs. M'Kean, and Dallas *à contra* insisted, that if the unlawful intention must appear on the face of the writing itself, any artful man may escape with impunity, though the publication may have the most pernicious tendency to interrupt the course of justice. There can be no doubt concerning the allusion of the paper. One suit only subsisted between the parties; and in that alone, Mr. Bayard took the affidavit before alderman, Inskeep to substantiate the truth of his exceptions to the report. To this oath, filed in this action, the publication must necessarily relate, and though it may be harder to influence a court than a jury, yet it is possible that the report may be set aside, and the merits of the cause may come before a jury for their decision. No atonement has been offered for this base outrage. The sole apology for the conduct of Passmore which is offered, is the assertion that Bayard has perjured himself, by swearing to that which was not true.

By the court. The implication is irresistible, that the publication referred to the suit then under the cognizance of the court. It was an attempt to prejudice the public mind in a cause then depending, and was in the eye of the law a contempt of the court.

Let the attachment go.

The defendant then submitted to answer interrogatories, and offered to give security for his appearance.

By the court. Let him enter into recognizance, himself in 300 dollars, and one sufficient surety in the like sum, conditioned for his appearance *de die in diem* to answer, &c. And in the mean while it behoves the defendant to consider well, what atonement he will make to the court as well as Mr. Bayard for the gross injury done to him by this publication.

RESPUBLICA *against* THOMAS PASSMORE.

THE interrogatories having been filed in the prothonotary's office, the defendant answered them in substance as follows upon his oath: He believed that there was no suit depending on the 8th September last, and referred to the records.

He denied that he had the most distant intention to prejudice the public mind in his favor "or to treat with disrespect the judicial authority of his country, for which he had always entertained the highest respect. He felt much irritated when he first saw the exceptions, and in the moment of his heat and passion, published the expressions he experienced, without allowing himself time to reflect on the harshness of the manner in which they were conceived, or the extent of their application.

He thinks well of Andrew Petit, and is sorry for the generality of his expressions which might tend to implicate him; and though he thought at that time, and still thinks, that he was extremely ill used by Andrew Bayard, certainly would not have adopted the measure of publishing, if the impetuosity of the moment had not hurried him into it."

The defendant appearing in court towards the end of the term, Mr. Levy in his behalf contended, that he possessed the right of palliating his conduct, and extenuating his offence by every means in his power. The interrogatories are administered to him for the better information of the court, with respect to the circumstances of the contempt. 4 Bl. Com. 287.

Mr. Dallas for the prosecution urged, that each step taken by the defendant was but an aggravation of his first offence; his answers are drawn up in such a manner, as to add fresh insult to Mr. Bayard, whom he so grossly injured before. He has

not extenuated his offence, but has aggravated it. He could not but know that his publication was a very improper act ; but if his intentions were even innocent, the justice of the country and of the court requires, that he shall stand committed. 1 Wms. 675. Ignorance of the law will not justify an improper publication. 2 Vez. 521. He also cited 1 Dall. 328. Wallace's Circ. Rep. 78. Mosel. 250, and Vern. and Scriv. 295, 296, 299. Where defendant submits to an attachment, the prosecutor has not a right to insist on exhibiting interrogatories to him. [*Sed vide*, 4 Burr. 2105, and 5 Term Rep. 362, *contra*.]

Shippen, C. J. However libellous the publication complained of may be, we have no cognizance of it in this summary mode, unless it be a contempt of the court. 2 Atky. 469. But we are unanimously* of opinion, that in point of law it is such a contempt, and readily concur with Lord Hardwicke, that "there cannot be any thing of greater consequence than to keep the streams of justice clear and pure, that parties may proceed with safety, both to themselves, and their characters." *Ib.* 471. If the minds of the public can be prejudiced by such improper publications, before a cause is heard, justice cannot be administered. The defendant has set at nought the advice we gave him when we ordered the attachment. He has made no atonement whatever to the person whom he has so deeply injured, and he can only blame himself for the consequences.

The judgment of the court is, that the defendant pay a fine of 50 dollars to the commonwealth, and be imprisoned in the debtor's apartment for the space of 30 days ; and afterwards, until the fine and costs are paid.

SAMUEL MEKKER and WILLIAM COCHRAN *against* SAMUEL JACKSON.

There may be a recovery against the acceptor on a bill of exchange lost or mislaid. The existence of the bill being once established, the plaintiff may prove the loss of it by his own oath.

SUIT against the defendant as acceptor of exchange, drawn on him by Daniel Smith, for 165 dollars, payable at 60 days sight, to David Deaderick or order, and by him indorsed to the plaintiffs. The bill was said to be accepted on the 30th April 1795, and to have been since lost or mislaid.

It was proved by the plaintiffs' clerk, that in April 1795, he entered this bill in their waste book, and transferred it to their bill book and numbered it ; that it was indorsed by Deaderick,

*Present also Brackenridge, Justice

but he knew not whether it was accepted. The letter book of the plaintiffs was shown, whereby it appeared, that the 8th March 1798, they had written to the defendant, and urged the payment of the bill, but mentioned their loss of it. To this he returned an answer dated the 16th of the same month, asserting that he had paid the greater part of the bill to David Allison, under a letter of attorney, but promised to pay them the balance due.

Meeker, one of the plaintiffs was offered to be sworn, to prove the loss of the bill, and the court allowed it, saying, the existence of the bill having been proved, he was a witness to the single point of its loss, from the necessity of the case, and so had been the adjudications.

Mr Hallowel for the defendant, observed, that if the bill had been produced, the hands-writing of the payee and acceptor should be proved on the trial.

The court said, these facts whereon the jury must judge. The former had been proved, and the latter might be inferred from the defendant's letter. But the plaintiffs must indemnify the defendant against the bill.

The jury gave a verdict *pro quer.* for \$240 14 cents, without leaving the bar.

Mr. Hare, *pro quer.* cited Finch's Rep. 301. Marius 42.

JOHN MOORE *against* JOHN E. SERVING.

Same plaintiff *against* the defendants in thirty one other actions.

The inspectors of the gaol of the county of Philadelphia are bound by the law of 4th April 1792, to furnish German passengers arrested and in the debtor's apartment, with blankets and fuel.

THE different defendants were in custody in the debtor's apartment, under process from the Court of Common Pleas, returnable to next March term. They were German passengers, and after being detained on board the vessel for thirty days, were arrested for their freight.

On motion of Mr. Rawle, in behalf of the owners of the vessel, a rule was made to show cause why a *mandamus* should not issue to the inspectors of the gaol of the county of Philadelphia, requiring them to furnish blankets and fuel for the persons above named being

poor confined debtors, pursuant to the provisions of the act of assembly passed the 4th April 1792.

Mr. M. Levy appeared in behalf of the inspectors, and urged, that the 2d section of the act of 4th April 1792, (3 St. Laws, 237,) respected only those prisoners who were not otherwise provided for by law, "such as are incapable of procuring fuel and blankets, by reason of their poverty." The law of 14th February 1729-30, §§ 3, 4, and 5, had subjected the importers to these expenses. 1 St. Laws, 252. The defendants are vagrants and vagabonds, they will not subsist themselves by their labor. This is a new and extraordinary case, and comes before the court at the instance of the owners of the vessel. But it having been formerly determined here, that the acts for the relief of insolvent debtors, do not extend to the cases of German passengers, it seems most reasonable, that the importer should furnish the blankets and fuel, and add those expenditures to the freight money. The city already sustains more than her portion of taxes.

Mr. Rawle *à contra* contended, that if the present case would have been embraced by the act of 1729-30, it was superseded by the provisions of the act of 4th April 1792. But it was neither within the words nor spirit of the former act. The passengers were neither convicts under indentures, nor poor and impotent, nor idle and vagrant persons. They came over freely and voluntarily; and the laws of the state encourage the importation of such men in a variety of instances.

This case is clearly within the preamble of the law of 4th April 1792. They are "confined in the debtors' apartment, and unable to procure fuel or covering for the winter season," and are clearly within the words of the second section, and are therefore entitled to the relief prayed for.

By the court. If the citizens of Philadelphia are subjected to unreasonable taxes, the legislature only is competent to redress the mischief. But apprehending as we do, that the case of these German passengers falls within the terms and meaning of the law of 4th April 1792, we are constrained to make the rule absolute.

JOSEPH GALLOWAY *against* ISAAC W. MORRIS, ISRAEL W. MORRIS,
THOMAS GREAVES, and THOMAS MIFFLIN.

Master of a ship no witness to prove the propriety of his discharge of a mate in a foreign port, without a release from the owners. Qu. Whether such release must not be by all the owners? Such grounds of discharge must be very strong to justify it.
A privilege of 3 tons or \$500 in lieu of it, payable at a foreign port to a mate, in addition to his wages, is insurable property when laid out in goods at such port.
A mariner loses his wages on a capture from the last port of delivery, and during the half of the time of his continuance there.

THIS was a suit brought by a mate against his former owners. The declaration stated four counts.

1. That the defendants agreed to receive the plaintiff on board their ship *Ariel*, as chief mate in her voyage from Philadelphia to Canton, and back again, at the rate of \$40 per month; to allow him 8 tons privilege, and in defect of this privilege, to pay him \$500 by their supercargo; to permit him to invest \$3000, and have a state room. The 2d count laid the special assumpsit with some variation. 3d count for mate's wages; and the 4th, a general count for money had and received.

The written agreement recited in the first count, was dated 31st January 1799, and the facts on the evidence, appeared as follows:

The *Ariel* sailed from Philadelphia, under the command of captain Jacob Coates, and arrived at Canton on the 10th August 1799. The captain was dissatisfied with the appointment of the plaintiff as chief mate, and wished that a Mr. Clarke, who went out as second mate, had filled the higher office. Hence a coolness appeared evidently to subsist between them, though the plaintiff was generally thought well of on board, and deemed an able seamen, and experienced navigator. All the witnesses agreed, that during the voyage, in the straits of Sunda, the plaintiff was much intoxicated on his birth night, during the latter part of his watch, and unfit for duty. Two of the hands on board, (the third mate and Cooper,) swore, that this was the only period wherein he appeared to them incapacitated or drunk during the voyage, and that the captain had agreed to overlook it. But the two supercargoes declared, that he was intoxicated twice or oftener, and that they felt apprehensions from his conduct; though the captain did not complain of him to his face, but suffered him to keep the log book.

Captain Coates was offered by the defendants as a witness. It was objected, that he was not a competent witness, to prove the propriety of his discharging the chief mate; and the case of *Robinett v. the Exeter*, in 2 Robins. Admty. Cases, 266, (American edit. 221,) was relied on, as being expressly in point. The counsel for the defendants admitted, that he could not be received as a witness, without a release

from the owners. They accordingly produced a release from Israel W. Morris, one of the defendants, to the captain for this purpose. This was also objected to, as not being within the custom of merchants, and therefore the strict common law rule applied, that it should have been sealed and delivered by all the owners.

The court ordered the captain to be sworn, without deciding on the latter exception; and declaring, that they left it open to future discussion, in case it should be necessary. He deposed, that he discovered the plaintiff to be addicted to drink during the voyage; and particularly in the straits of Sunda, where the navigation was perilous, he was so very drunk as to be unfit for duty, during his watch, and moreover brought the third mate into the same disqualified state with himself. At another time he differed with the witness without cause, shook his head and fist at him, and threatened to leave the vessel, whenever he had it in his power. On the coast of China, he was also intoxicated, and on the third day after the ship's arrival at Canton, he was again in the same situation. On this latter occasion, the captain desired the doctor to continue in the cabin for its security, while he visited an English ship in the river Tigris; and in his absence the plaintiff quarrelled with the doctor, so that the captain was obliged to return quickly, and put him under arrest. Coates declared, that he discharged the plaintiff on the grounds of his getting drunk frequently, threatening to leave the vessel, and being guilty of behavior bordering on mutiny, on the 9th November 1799, at Canton. The reason he assigned for not admonishing the plaintiff for his improper conduct, was, his fears lest he should quit the vessel, according to his threats.

On the day following his discharge, the Ariel sailed from Canton, on her return to Philadelphia, was captured by a French privateer, May 1800, and carried into Guadaloupe, where the vessel and cargo were condemned. The captain and mariners lost their wages from the last port of delivery. The plaintiff shipped himself on board another vessel bound for New York, and arrived there safely.

It further appeared, that if the 500 dollars had been paid to him at Canton, he might have insured any merchandizes bought therewith, as other American vessels were there at the time, and insurances were affected by the captain and supercargoes.

On the 29th August 1799, the plaintiff, by a letter directed from Wampoo to the supercargoes, resigned to them his privilege of three tons, on the terms previously agreed on between his owners and himself.

The plaintiff's present demand was for his full wages, from

the time of the agreement until his subsequent arrival in Philadelphia on the 17th June 1800; the 500 dollars claimed to be due at Canton, and the like sum for his estimated profits thereon; for his traveling expenses and freight of baggage from New York to Philadelphia; and a small account for provisions for sailors paid by him; leaving a balance of \$962 $\frac{1}{8}$ claimed by him, after crediting the different payments which had been made to him.

The defendants' counsel contended, that it is not only a right, but a duty in a captain to discharge an officer on board, where he gives just grounds of apprehension. The master is responsible for his own conduct and those under him. In the case of the *Exeter*, cited from 2 Robins 261, there was but a single instance of intoxication, when the party was not in the discharge of his duty. Here are repeated fits of drunkenness, threats to quit the ship, and mutinous conduct. No wages could be due to the plaintiff after he was discharged. A Court of Admiralty will consider the conduct of a mariner, when they estimate his wages. 3 Mod. 244.

The claim of wages until the plaintiff's arrival in America, after the *Ariel* had been captured, is contradicted by all the authorities. A mariner by capture loses his wages from the last port of delivery, and half the time he was in port to unladen. 1 Ld. Raym. 739. A seaman shall recover wages *pro rata*, for the part of the voyage he had performed before he was impressed, if the ship out of which he was pressed arrives at her delivering port. But if the ship is captured, though ransomed afterwards, he loses his wages. 2 Lord Raym. 1212. The wages of a seaman are not payable, if the vessel be lost or taken before she arrives at the port of delivery. 3 Burr. 1844. An officer or sailor who has engaged to serve on board a letter of marque, for certain wages during the voyage, and a share of all prizes, is not entitled to any part of the wages if the ship is taken before she completes her voyage, though he shall have been sent from the ship before the capture, as prize-master on board a prize taken in the course of the voyage. Doug. 520 (539.)

The opinions found in the books, that seamen may insure goods bought abroad with their wages, do not apply to the present case because the 500 dollars relate to the inward as well as outward voyage. Where sailors engage by the run, they are not entitled to wages unless the whole voyage is performed. And so was the decision in the late case of *Cutter v. Powell*, where the party died before the arrival of the ship. 6 Term Rep. 320. The perquisite of the average price of a

negro slave, as sold in the West Indies, in addition to the monthly wages of 6*l*. stipulated to be paid to a chief mate, could be considered in no other light than as wages, by *Ld. Ch. Jus. Eldon. 2 Bos. and Pull. 119.* The 3 tons privilege here come in aid of wages, and the 500 dollars to be given in lieu of them partake of an uninsurable quality, and like the three privilege slaves, free of expense, agreed to be delivered to a mate in addition to 5*l*. per month wages, on the ship's arriving at the port of sale, in *Webster v. De Tastet*, could not be recovered in an action against the underwriters. 7 Term Rep. 157.

The plaintiffs' counsel divided their argument into three heads: 1. Was the plaintiff legally discharged by the captain? 2. If not, does the capture of the *Ariel* preclude the payment of the \$500, and reasonable profits thereon? 3. Whether goods bought with the \$500 were insurable.

1. It is admitted that an officer may be discharged by the captain for gross misconduct but it must be in a clear case. It is said in 1 *Mol. 252* (lib. 2, c. 3. sec. 2) that if a mariner shall commit a fault, and if the master shall lift up the towel three times before any mariner, and he shall not submit, the master at the next place of land may discharge him. In the case of the *Exeter* before cited, Sir William Scott lays down the rule, that little less than absolute necessity is required to bear out an order of discharge in a remote country. 2 *Robins. 226.* And he gives the reason in the beginning of the case. If an officer is discharged for insufficiency, it may be easy for him to procure another situation; and he is in danger of losing not only his present footing, but more particularly those prospects of promotion, which depend in a great measure on the character that has traveled along with him during his former employs, and has been the most valuable fruit of a life of service. However, only such indulgence should be shown him as the equitable considerations of public utility require, which can seldom in such cases, any more than in others, be separated from particular justice. *Ib. 216, 217.* He gives his opinion with great good sense and knowlege of the world, as to the matter of drunkenness, and disobedience to lawful command. *Ib. 218.* And in *pa. 219* he says, the captain should take the precaution to do, what always ought to be done in a matter so tender as the discharge of an officer; to call the attention of the passengers and crew to the circumstances attending it, that the propriety of the act may be properly warranted, and vouched by as much evidence as possible. In one instance of intoxication the witnesses agree, but for this the plaintiff was forgiven by the captain. It is true, the latter swells the account

beyond the other witnesses, but there must be a strong bias on his mind. He is answerable to the plaintiff for his conduct, and is interested in defending its propriety. If the plaintiff had been an habitual drunkard, would not many instances of it have occurred in a voyage exceeding six months? If he was negligent or inattentive to his duty, would not the captain have openly reprehended him for it, instead of confiding the log book to his care? Has no one else on board heard his threats to leave the ship, or been a witness of his mutinous conduct? How comes it that all these particulars have not been pointed out on the different occasions to the passengers and crew on board?

2. It cannot be denied, that if the plaintiff was prevented by the captain's unjustifiable act from returning in the *Ariel*, he must be considered as having performed the voyage. If he was illegally hindered from coming back in the ship he went out in, he ought to receive wages for returning in another vessel. The 500 dollars for the three tons privilege was stipulated to be paid by the supercargo, and the payment must necessarily have been intended to be in Canton. If this sum is considered as wages, according to the reasoning of the adverse counsel, then it falls within the case in 1 *Ld. Raym.* 739, and the other authorities; and the plaintiff might, if he had thought proper, have returned the goods purchased therewith by some other vessel in port, or if the vessel in which he had safely arrived at New York. It is clear, that if he had left the *Ariel* without reasonable cause at Canton, after receiving his wages thither and the 500 dollars, there might be a recovery against him by his owners.

3. Almost all ordinances forbid the insuring seamen's wages, and the reason is, that their own interest may lead them to do all they can for the ship's preservation. *Pothier* 33, § 39. But when it is said that no insurance can be made on seamen's wages, it must be understood to mean on such wages as are not due till the voyage be entirely finished, for if they engage to go a long one, and covenant to have some money paid them abroad, to lay out in goods to bring home, insurance may be made on such goods. *Wesk.* 587. 1 *Mag.* 18, 19. In such a case, they are to be considered in the same light with other men. *Park Insur.* 13, 14. In most countries, seamen are allowed to insure such goods as they purchase with the wages they receive abroad, and the restraint in Great Britain is meant only to apply to such wage as are not due till the voyage is entirely finished. 1 *Marsh. Insur.* 75. 1 *Emerigon* 235, 236. In *Webster v. Tastet*, 7 *Term Tep.* 157, the wages were not to be paid until the vessel arrived in the West Indies, and

on that ground were held not insurable. It is possible that the Ariel might have been saved from capture, if the exertions of the plaintiff had been added to those of the crew, in his return home. And if the 500 dollars worth of goods had been shipped in another vessel, it could have had no effect on the exertions of the plaintiff to preserve the Ariel.

Shippen, C. J. delivered the court's charge, after stating minutely the evidence.

There can be no question but that an inferior officer may be guilty of such misconduct as may justify the captain in discharging him in a foreign port. But it ought to be in a clear case, and on good grounds. For the reasons urged by the plaintiff's counsel, absolute necessity almost is required to justify the measure. Three grounds are alleged here, but of the threats to leave the ship or of mutinous behavior, we have no proof except from captain Coates. It is very extraordinary that he did not complain of this at the time to the other persons on board, and he is certainly interested in defending his own conduct; yet it must be acknowledged, that he is corroborated in his present account, by the letter he wrote to the plaintiff from Canton, assigning the reasons of his dismissal. These circumstances will have their proper weight with the jury. As to the alleged intoxication, if we adopt the account of the supercargoes, that he was twice or oftener in liquor, it does not prove that he was frequently drunk. Once indeed in the Straits of Sunda he was most unjustifiably drunk, and unfit for duty during his watch; but after the captain had granted him his pardon for this misconduct, he ought not to have remembered it, except on some new offence. We hear of no other instance but this when he was disabled from doing his duty, and the habits of maritime life will not warrant us in laying down too strict a rule of morals, as applicable to sea faring men during voyage of one half of the year.

If the jury shall be of opinion that the discharge at Canton was not justified by the circumstances of the case, they will consider that the 500 dollars was payable there by the supercargoes, from the nature of the contract, in lieu of the three tons privilege. This privilege he surrendered to them upon the terms of the contract, though he made no formal demand of the money. If he had received this sum and invested it in goods, which he had shipped in the Ariel uninsured, he would have lost the whole on her capture. But he might legally have insured such goods purchased with money then earned, and it appears by the

authorities cited, that there is a solid distinction between such a case and another where the wages were contingent, and depended on the full completion of the voyage. Though he might also have insured the reasonable profits on such goods, yet the measure not being very common, it is not probable it would have been pursued by a sea faring man ; and it does not seem reasonable that the plaintiff should, as matters have turned out, be placed in so much better situation than all the other officers and mariners on board, against whom there has been no charge or insinuation of misconduct.

The plaintiff is not entitled to wages on the return voyage from China to Philadelphia. Where a vessel has been captured, the wages of the seamen are lost from the last port of delivery, and so has the law been held ever since the case in 1 Ld. Raym. 739.

So that upon the whole, if the Captain unduly dismissed his chief mate, the wages in the voyage to Canton and for half the time of the Ariel's continuance there, together with the 500 dollars, seem justly due to the plaintiff, after deducting the moneys he has received. Interest is generally allowed on contracts at least from the commencement of the suit, but circumstances may alter the rule, of which the jury are the proper judges.

Verdict, *pro quer.* for 399 $\frac{10}{100}$ dollars.

Messrs. Ingersoll and Porter, *pro quer.*

Messrs. Rawle and Franklin, *pro def.*

RESPUBLICA *against* ADAM TRYER.

An indictment grounded on a statute, must pursue the description of the offence contained therein.

Therefore an indictment against an insolvent debtor, under the act of 4th April 1798, for fraudulently concealing his estate, with intent to defraud his creditors, but omitting to lay it, "thereby to secure the same," or "to retrieve or expect any profit, benefit or advantage thereby," was held ill.

The time and place of such fraudulent concealment must be alleged.

AN indictment was found against the defendant in the county of Berks, containing two counts ; the one for a perjury, (which was substantially formal,) the other for a misdemeanor, as follows :

Berks county, ss. The grand inquest for the county of Berks, on their oaths and affirmations, do present, that, &c. [and charges a perjury.]

And that on the same Monday, the same fifth day of January, in the year of our Lord 1801, at the court house in Reading in the county aforesaid, in the said Court of Common Pleas, so holden as aforesaid,

before the judges aforesaid, came in his proper person, as an insolvent debtor, praying the said court to grant him the benefit of the act of general assembly of this commonwealth, made for the relief of insolvent debtors, passed on the fourth day of April 1798, Adam Tryer, of, &c. and thereupon he did exhibit to the said court a writing, purporting to be a true schedule or inventory of his debts, credits and estate, and then and there in open court did take his corporal oath on the holy gospel of God, (the said judges and court having a competent authority to administer an oath to the said Adam Tryer in that behalf,) and the said Adam Tryer in no wise regarding the good and wholesome laws of this commonwealth, nor fearing the pains and penalties therein contained, but wickedly intending by color and pretext of the said act of assembly to deceive and defraud one Christian Domacher, (then and long before and still being a creditor of the said Adam Tryer,) and divers others the creditors of the said Adam Tryer to the jurors aforesaid unknown, of their just debts, then and there, to wit, on the said fifth day of January, in the year aforesaid, with force and arms at the aforesaid county Court of Common Pleas, there holden as aforesaid, before the judges aforesaid, having authority as aforesaid, maliciously, willfully and corruptly did swear, protest and declare, among other things, that he had not any estate, effects or property whatsoever, either in possession, reversion or remainder or expectancy, other than what was mentioned and contained in the said schedule or inventory, except the necessary wearing apparel and bedding for himself and family, not exceeding in value the sum of fifty dollars in the whole whereas in truth and in fact, he the said Adam Tryer, on the said fifth day of January, in the year aforesaid, at the county aforesaid, had other estate and effects in possession, remainder, reversion or expectancy than what was mentioned and contained in the schedule or inventory, besides the necessary wearing apparel and bedding for himself and family aforesaid, to wit, one stone messuage and thirty-one acres of land, with the appurtenances, situate, lying and being in the township of Exeter, in the said county, and also was then and there entitled to the sum of 350*l.* lawfull money of Pennsylvania, owing to him by his father Jacob Tryer, and also the sum of 11*l.* due to the said Adam Tryer, upon a bill from a certain William Bland to him the said Adam Tryer, which estate and property aforesaid, he the said Adam Tryer did not disclose, but the same fraudulently and wickedly did conceal with intent to defraud the said Christian Domacher and others, his just creditors, of the same, to the evil example of all others in like case offending, contrary to the act of assembly in such case lately

made and provided, and against the peace and dignity of the commonwealth of Pennsylvania, &c.

A *noli prosequi* was entered on the first count for perjury, by the attorney general, and the defendant was convicted of the misdemeanor and deceit on the second count, upon the 3d August 1802, in the Court of Quarter Sessions of Berks county.

The following reasons were then filed in arrest of judgment, and argued in the sessions.

1. The title of the act, on which it was meant to ground this prosecution, is mistaken. It is stated to be "an act of assembly made for the relief of insolvent debtors, and passed on the fourth day of April 1798," whereas there is no such act.

2. It is stated in both counts that the defendant had other estate and effects in possession, reversion, remainder or expectancy than were mentioned or contained in such schedule or inventory, which is uncertain as to the nature of the estate omitted, the one being in the disjunctive "possession or expectancy," the other in the past time indefinitely.

3. In order to bring the defendant within the penalty, it should appear that he is within the benefit of the act. But the indictment contains no averment that the defendant is of that description of persons to whom the act extends.

4. The property charged to be concealed is altogether unspecified and uncertain; the words "which estate and property aforesaid," relating to and comprehending as well the property specified in the schedule as that which is said not to be included in the schedule.

5. The material facts charged in the second count are, that the defendant concealed with intent to defraud; neither the time when, nor the place where the fraud was committed, is alleged.

6. The defendant is charged with concealing property, with intent to defraud Christain Domacher and other creditors; without alleging in the words of the act that he did this, thereby to secure the same, or to receive or expect any profit, benefit or advantage thereby.

7. That the words, "The Grand Inquest for the county of Berks on their oaths and affirmations do present," are omitted in the second count, so that it does not appear that the bill was found or presented by the Grand Inquest of the county aforesaid.

8. No proceedings can be sustained in this court on the act of assembly on which the prosecution is grounded, because the act expired before the jurisdiction attached.

9. The act, as it respects the defendant, was repealed and annulled to all intents and purposes, by the act of congress, entitled "an act

to establish an uniform system of bankruptcy throughout the United States."

10. The writing purporting to be a true schedule or inventory of the debts, credits and estate referred to in the indictment, is not stated in such indictment, to be filed among the records of the Court of Common Pleas, of the county of Berks, or any where else.

Daniel Clymer.

Charles Evans.

Frederick Smith.

Upon argument, the sessions overruled the reasons in arrest of judgment, and sentenced the defendant to a servitude at hard labor for two years. Whereupon a writ of error was brought, and Messrs. Ingersoll and C. Evans argued, that the indictment was erroneous. But they abandoned the first, fourth, eighth, ninth and tenth exceptions.

2. All offences must be charged in direct and positive terms, and not in the disjunctive. But here it is alleged, that the defendant had other estate and effects in possession, remainder, reversion or expectancy, than were mentioned in his inventory ; to wit, one stone messuage, and 31 acres of land, &c. Now it does not appear by this allegation, whether he held the premises in possession, remainder, reversion or expectancy ; and consequently he could not come prepared to defend himself against this charge.

To this, the attorney general and Mr. Collinson Read, in behalf of the commonwealth answered, that the nature of his estate in this property was immaterial, nor could the counsel who drew the indictment, be supposed to know it. Three things should concur in every criminal proceeding. 1. The party accused should be appraised of the charge he is to defend. 2. The court should know what judgment is to be pronounced according to law. And 3d. Posterity should know, what law is to be derived from the record. 5 Term Rep. 623. Besides, the words or expectancy, are not to be found in the 1st section of the act of 4th April 1798, which prescribes the oath, (4 St. Laws, 270,) and therefore they may be rejected in the indictment, as idle and insensible. In Morris's case, (Leach, 113,) tautologous words were rejected as surplusage. And in Redman's case, (*Ib.* 410,) it is held, that a bad indictment may be made good by rejecting as insensible and useless, such words as obstruct the sense of it.

Upon the court's remarking, that in addition thereto, it appeared to be laid with sufficient precision, that the defendant was entitled to 850l. under his father, and 11l. due by Bland, neither of which sums were inserted in his inventory, this exception was also dropped.

3 Two descriptions of persons are comprehended by the law in question. The 1st section includes inhabitants within the state two years, previous to their application for the act, though not in execution; the 14th section, persons under execution. But it is not alleged here, that the defendant was, in either character, entitled to the benefit of the law. The Court of Common Pleas had in this particular, a limited jurisdiction, and special powers were vested in them by the legislature. In an indictment against a bankrupt for concealing his effects, it is always stated, that the party used the trade of merchandize, and got his living by buying and selling, that a commission issued against him, &c. Cro. Circ. Comp. 160, (105.) And in a case of considerable hardship, where an insolvent debtor was discharged at an adjourned session, under the stat. of 37 Geo. 3. c. 112, which gave the justices of the peace authority to discharge under certain circumstances, the sheriff was held chargeable for the escape. 8 Term Rep. 424.

Answer. It is not competent to the defendant on the present prosecution, to say, that it does not appear he was entitled to the benefit of the act. He came as an insolvent debtor, claiming relief under it and complied with its injunctions, by filing his petition and schedule under it. Indictments against bankrupts are very minute and particular, because the commissioners possess an inferior and limited jurisdiction; but the Common Pleas, under the act, are considered in a very different light. In inferior courts, every thing that makes the gist of the action, must be laid, so as to appear to be within their jurisdiction. 1 Salk. 404.

The court seemed to be of opinion, that the omission alleged, was not a material defect.

5. The essence of the second count is a fraudulent concealment by the defendant of his property, and not perjury. For the latter offence there was a particular count on which a *noli prosecute* has been entered. Here it is alleged, that the defendant wickedly intending to defraud his creditors, swore, &c. Whereas in fact he had other estate and effects, than those specified in his schedule, and it goes on to enumer-

ate them. But no day or place of concealment are laid, which is contrary to all the precedents. The year and day of all material facts, must be stated. 2 Hawk. 235. Every material fact issuable and triable, must be laid with time and place. 5 Term Rep. 620. It is necessary to state some time, when each fact happened, that is material to constitute guilt. *Ib.* 624. In that case the offence was laid in one of the counts, during the time of the defendant's being one of the counsel, and was held ill. *Ib.* 625. Here the pronoun relative, refers only to the estate, and not to the time and place of the supposed fraudulent concealment.

Answer. The time and place are alleged as to the defendant's appearance in court as an insolvent debtor and exhibition of his schedule; and the taking of the false oath, as to the contents of the schedule; with intent to defraud his creditors, is connected therewith by the words then and there; moreover the true statement of his estate and effects, is alleged with time and place. And in all this, it is apprehended there is sufficient certainty, which may arise from a necessary inference. The words shall be taken in their common sense. Cowp. 679 682.

The allegation of a day, *prima facie*, somewhat uncertain, may be helped by the apparent sense of the whole. 2 Hawk. 181. On an indictment for a rescue, it shall be intended to be where the arrest was. Cro. Jac. 354. 2 Bulst. 208. A is indicted, *quod prima die maii anno 21 Eliz. in quendam B, insultum fecit et ipsum verberavit*, but says not *ad tunc et ibidem verberavit*, yet rule good, for the *vi et armis* day and place named in the beginning, referred to all the ensuing acts. 2 H. H. P. C. 178. The perjury here is one means of concealment. Vide. 2 Stra. 904.

6. This second account is grounded upon the 10th section of the law of 4th April 1798, which introduces an offence, *suigeneris*. It is neither at common law nor under the act of bankruptcy. It is described to be "where such debtor hath directly or indirectly sold, leased, or otherwise disposed of in trust, or concealed any part of his or her property of any kind, or any part of his or her debts, rights or claims, thereby to secure the same, or to receive or expect any profit or advantage thereby to deceive or defraud his or her creditors; and being thereof convicted," &c. It is true, the perjury may be one means of concealment, but not the only one. The acts of selling, leasing or concealing, must be to secure the same, or expect any profit, benefit or advantage thereby, to defraud creditors. The description of the crime in the act must be pursued. Thus, on an indictment

for perjury on the statute of 5 Eliz. c. 9, the word willful must be inserted, because it is a material description in the statute of the offence. Leach 69, Cox's case. So an indictment on the statutes of 5 and 18 Eliz. for clipping and lightening coin, was held bad, for leaving out the words for *lucre* sake. 1 H. H. P. O. 220. No circumlocution can supply the want of technical words. 8 Bac. 113.

Answer. The object of the section was to prevent frauds practiced on creditors ; it was made for their security. It enumerates independent offences ; selling, leasing, disposing of in trust, or concealing with intent to deceive creditors, are all within the act. It is immaterial, whether the debtor gains or expects to gain by the concealment of his estate. It is only of moment that the act is done, with the intent to deceive or defraud creditors.

7. It does not appear that the indictment was found by a grand jury on oath. All the precedents in the books, as well as in the state, insert in the second count, " and the jurors aforesaid upon their oaths and affirmations aforesaid respectively do present." &c. The several counts contain independent offences, and *ignoramus* may be returned as to some, and a true bill as to the remainder. The first count in this indictment is disposed of by the *noli prosequi* ; but even admitting that this was not the case, the second count cannot be supported in its present form. An indictment, *juratores presentant*, will. 2 Keb. 676. Indictment quashed, for that the jury were not said to be sworn. 1 Keb. 829. If a special verdict found the words of the present indictment, no judgment could be rendered on it. Forms in criminal prosecutions particularly, should not be departed from. Our zeal for punishment should not absorb individual safety. In the language of Lord Mansfield (4 Burr. 2539) God forbid, that the defendant should not be allowed the benefit of every advantage he is entitled to by law.

Answer. The counts must necessarily be considered together, to render them intelligible. It always happens, that terms of relation are inserted in the latter counts, which refer to the first count, and the words said, aforesaid, &c. are frequently made use of for this purpose. The offences in each count are distinct, and in that sense independent ; but it by no means follows, that the phraseology of the one count may not be applicable to a succeeding one, as in the instance of the county wherein the indictment is found, which is uniformly inserted in the margin of the first count, but is never inserted in the following counts. The *noli prosequi* only disposes of the first count, so far as it charges the perjury ; but the presentment of the grand inquest upon oath and affirmation, still remains, as referable to the second count. If there

had been an acquittal or conviction on the first count, instead of *noli prosequi*, and the defendant had been convicted on the second and the same should be deemed sufficient in all other particulars, there is little doubt that judgment could legally be entered on it. The defendant ought not to be deprived of any legal advantage, but frivolous exceptions to indictments should be discouraged, and are justly liable to censure. 2 H. H. P. C. 198. 2 Hawk. 228. The substance of justice has often been lost in pursuit of the shadow of mercy. Eden's Principles of Penal Law 181.

The court on consideration reversed the judgment of the sessions for the reasons assigned on the sixth exception, that the indictment did not pursue the description of the offence as contained in the 10th section of the law of 4th April 1798; and further said, there was considerable weight in the fifth exception. On the last exception, they intimated no opinion, but directed that the defendant should stand committed until he gave security for his appearance at the next Court of General Quarter sessions of the peace, to be held for Berks county to answer a new indictment.

MARCH TERM, 1803.

CORAM—SHIPPEN, CHIEF JUSTICE YEATES, SMITH AND BRACKENRIDGE JUSTICES.

JESSE PRITCHET, who survived ISAAC STARR, jun. (for the use of HENRY SPARKS, jun. surviving partner of ISAAC LLOYD) *against* The Insurance Company of North America.

The policy and principles which gave rise to the British statute of 19 Geo. 2, c. 37 have been adopted here both in courts of justice and by commercial usage.

Owner of a vessel and cargo may fairly insure in a valued policy to two ports in the West Indies, to the amount of the prime cost of the goods and the premium, and the costs of freight thereon to the first port.

ACTION on a policy of insurance, on goods on board the brig *Neutrality*, William Clark, master, at and from Philadelphia, to one port in Martinico, and at and from thence to St. Thomas's subscribed 2d March 1798. The goods were valued at \$15,000, and insured at a premium of 17½ per cent.; and the policy was assigned over by the insured to Sparks and Lloyd on the 29th March following.

The brig sailed from the capes of Delaware on the 16th March, and was captured in her voyage to Martinico on the 19th April, by the French privateer Jealous, captain Kautier, who put a French crew on board. On the 21st April she arrived at Point Petre, in Guadaloupe, and on the next day the captain made his protest. On the 1st May the brig and cargo were condemned in the French Court of Admiralty, on the ground of being bound to an enemy's port in rebellion against the French republic.

The defendants had likewise underwritten a valued policy on the body of the vessel for \$5000, and admitting that there had been a total loss, had paid on account of both policies at different times, \$15,858 $\frac{1}{10}$, and about three weeks before the trial, had tendered to Sparks \$329 $\frac{3}{10}$, the return premium and interest thereon, but had neither paid off the costs nor brought the money into court. They resisted the plaintiffs' claim of \$4812 $\frac{1}{10}$, on the ground of an over insurance.

The plaintiffs owned the vessel and cargo when the policies were underwritten, but effected no insurance on the freight of the goods, which at the usual freight of \$2 per barrel, amounted to \$3,814 16

And it appeared, that the prime cost of the cargo,	
and the premium of insurance thereon, were	11,182 56
So that if it was intended to insure the freight, there was only over insured, the sum of	3 28

\$15,000 00

A respectable merchant was called on after the trial had proceeded a considerable length, who gave evidence, that the premium of freight insured in this port was usually the same as on vessels and cargoes, though it was otherwise in the port of New York; and that the profits on goods were frequently insured as goods merely, and it was understood generally by the contracting parties. Coffee known to have been laid in at 16 cents per pound, had often been insured in valued policies at 22 cents per pound, the difference of 6 cents being contemplated on both sides as profits, and so of other articles.

Messrs. Ingersoll and Moylan for the defendant, admitted, that the profits on the cargo of a vessel were legal objects of insurance in a valued policy, as on a cargo of molasses, under a contract by the insured with government, to supply the army in Canada with spruce beer. 1 March. 111. So a valued policy on a commission expected

by the insured, as consignee of a cargo, is a good insurable interest. *Ib.* 112. But in both instances they must be insured *eo nomine*. Indeed in France, profits being precarious, and depending upon the uncertain event of future traffic, are not deemed a proper subject of insurance. But in England, it is not unusual to insure profit, *eo nomine*. *Ib.* 78. And there profit is not recoverable on an insurance on goods. Park. 267, 5th ed. So on a general insurance on goods, the party cannot recover money lent on bottomree. Though bottomree and respondentia are a particular species of insurable property, yet it must be expressed in the policy to be respondentia interest. Park. 1st ed. 10, 801, 487. 3 Burr. 1394. 1 Bl. Rep. 405. These rules appear to be founded in good sense and strong reason.

The plaintiffs might certainly have insured the freight of their brig, which they have not done, and therefore cannot seek an indemnity on that ground.

The defendants rely on the legal objection that there has been an over insurance; and it is of great importance that the mercantile law should be ascertained with accuracy. It will scarcely be denied, that the British statute of 19 Geo. 2, c. 37, has been so far recognized here, as that wagering policies are not admitted by commercial usage. The causes which induced the parliament to enact that law are expressed in the preamble, and most of them are applicable to the mercantile interests of the United States. Park. 299.

The only difference between valued and open policies, is that in the former, goods or property insured are valued at prime costs, at the time of effecting the policy; in the latter the value is not mentioned. Park. 1. The value in the former policy is, or ought to be, the real value of the ship, or the first cost of the goods, at the time of effecting the policy. If they be much over valued, it must be done with a bad view. 2 Burr. 1171. 1 Marsh 199. The reason given before the passing of the statute, why the law allowed, that a man having some interest in the ship or cargo, might insure more, or five times as much, was, that a merchant cannot tell how much or how little his factor may have in readiness to lade on board his ship. 2 Vern. 270. That reason totally fails here. The goods were laid in at the port of Philadelphia, where the plaintiffs resided, and who knew the exact amount of the goods; but notwithstanding this knowledge, their valuation has exceeded the true amount at least 25 per cent. The president and directors of the company could know nothing of the prime cost of the goods, unless through the representation of the insured; and this policy presents itself

in the form a wager, under color of a real interest. The value in the the policy ought not only to be considered as *prima facie* evidence of the interest, and may be disputed. 1 Marsh. 201. An insurance is a contract of indemnity from loss or damage, arising upon an uncertain event. The office of insurance, strictly speaking, is not to make a positive gain, but to avert a possible loss. *Ib.* 80. The same author gathers from the imperfect report of *Le Pypre v. Farr*, 2 Vern. 716, that in the case of a valued policy, the insured is considered as bound, if called upon, to show that goods to the amount in the policy were in fact put on board, from which it may be inferred, that the Court of Chancery, at least, still deemed the policy valid only to the extent of the interest insured. 1 Marsh. 100.

Messrs. Lewis and M. Levy for the plaintiff. We do not admit that the statute of 19 Geo. 2, c. 37, has been extended to this state by practice.

Shippen, C. J. Certainly the British act does not bind us, *proprio vigore*; but the system of national policy, which dictated the law, has been adopted by our courts. We believe, that policies made here, at least by the incorporated companies, do not retain the words "interest or no interest." But if it should come out in proof, in the language of *Ld. Mansfield*, that a man had insured 2000*l.*, and had interest on board to the value of a cable only, he would not be entitled to recover under such a policy. 2 Burr. 1171.

At common law, a person might have insured without having any interest. 8 Term. Rep. 23. But conceding that the spirit of the British act of parliament is applicable to our local situation, what are the circumstances of the present case? *Pritchett* and *Starr* were the sole owners of the brig and cargo. They contemplated a double outward voyage to two ports in the West Indies, and made their insurances accordingly. Laying aside the mercantile usage of this port, to insure profits as goods, which has been fully proved, it is obvious, that if the cargo had reached *Martinique*, it would have acquired the super-added value of the freight. It is of no moment as to the point in question, whether the goods were transported thither in the vessel insured or of a stranger. The cost to the insured is the same. Now on the most accurate estimate of the cargo, it turns out, that the freight thereof, added to the first cost of the goods and the premium of insurance, exceeds the valuation in the policy only three dollars and twenty-eight cents. It cannot be pretended, therefore, that the cargo was greatly

over valued, or that the insured had only a colorable interest. Although in *Tonge v. Watts*, 2 Stra. 1251, Lord Chief Justice Lee held that the ship being lost before the cargo was actually on board, though ready to be shipped, the insured, who had insured the freight as well as the ship, could not recover the former; yet it was afterwards determined in *Montgomery v. Egginton*, that the insured upon a valued policy on freight, is entitled to recover the whole amount, though part of the goods only were on board at the time the ship was lost, the rest being ready to be shipped. 8 Term. Rep. 362. It has been also adjudged, that on a mixed policy of a peculiar sort, partly a wager policy, partly an open one, and within the exception of the statute of 19 Geo. 2, c. 37, the insured was entitled as for a total loss, and the policy being valued, and fairly so without fraud or misrepresentation, the insured had agreed to the value, and was concluded to dispute it. 4 Burr. 1969. In *Lewis et al v. Rucker*, 2 Burr. 1171, Lord Mansfield says, "a valued policy is not to be considered as a wager policy, or like interest or no interest. It is settled, that upon valued policies, the merchant need only prove some interest to take it out of 19 Geo. 2, and if more was required, the agreed valuation would signify nothing. The effect of the valuation is only fixing conclusively the prime cost. If it be an open policy, the prime cost must be proved. In a valued policy it is agreed."

Serjeant Marshall, from whose late compilation on the law of insurance the authorities on the part of the defendants have been extracted, lays down the law of England to be not quite so rigid as in France. Where a valued policy is *bona fide*, meant as an indemnity, the courts will not enquire very minutely whether the valuation be very near the true interest of the insured. A small excess ought not to be regarded. Considering the uncertainty of every valuation, a scrupulous exactness in this point would only occasion endless litigation. 1 Marsh. 202. Indeed his book does not seem equal in point of merit to Park, whose accuracy has never been doubted, and who has argued most of the late cases in the King's Bench. The strictures which the former had made on decisions and doctrines, which seemed to him to militate against any acknowledged principle of law, unsparingly, do not always appear to be well founded. (See 1 Marsh. Pref. VII.) The inference he has drawn from 2 Vern. 716, (in his 1st vol. 100,) seems unwarranted by the Lord Chancellor's decree. It was a valued policy on goods at 600*l*. The insured had abandoned, and part of the goods had been saved. It was referred to a master to examine the value of the goods so saved, and to deduct it out of the 600*l*. The decree there-

fore only shows that the insured was not allowed to have more than the amount of his valued policy, and that he should account for the value of the articles saved, which being in his own hands or of his agent, were to be deducted from the 600l.

Yeates, J. gave the charge of the court, in the absence of the Chief Justice, who was indisposed.

The verdict must necessarily be for the plaintiff. But whether it should be for the 829 dollars 31 cents which the defendants have admitted to be due by their late tender, and yet have not brought the same into court and paid off the costs, or for the 4812 dollars 9 cents, the balance claimed by the plaintiff is the only question.

The British statute of 19 Geo. 2, c. 37, passed in 1746, and was intended to put an end to insurances without real interest, which in process of time had become a cover for mere gaming contracts. (Vide history of wager policies since the revolution, in Marsh. 99) There is a seeming contrariety between the opinions of Park and Marshall, whether under the statute the valuation specified in a valued policy is to be the measure of damages, in case of a total loss. They however agreed in this, that where valued policies are used merely as a cover to a wager, they would be considered as an evasion of the statute as in the instance put by Ld. Mansfield, of one insuring 2000l. and having interest on board to the value of a cable only, 2 Burr. 1171. If the property be much over valued, it must be done with a bad view, either to gain, contrary to the words of the act, or with some view to a fraudulent loss. *Ibid.* Park 122. 1 Marsh. 110.

Serjeant Marshall, in his useful treatise, professes in his preface, to point out any decision, or any doctrine advanced, which militated against any acknowledged principle of law, and to treat them with a proper freedom, but with decency and respect. Hence, he has been led to consider the usage, though sanctioned by the approbation of great and eminent judges, that in cases where the interest of the insured is less than the sum insured in a valued policy, to pay the whole sum insured, upon a total loss, as irreconcilable with the provisions of the stat. of 19 Geo. 2, c. 37, and tending to convert every loss into a total one. 1 Marsh. 111. And he expressly asserts, that the value in the policy, ought only to be considered as *prima facie* evidence of the amount of the interest of the insured; which being admitted on his mere representation, the insurer is not thereby concluded, but may dispute the amount of the interest if it be over valued, as well in an action upon a valued policy, as upon an open one. But he neverthe-

less agrees in the passage already cited, that the usage which he condemns, is uniform and constant, and approved of by authority; and that courts of justice will not scrupulously examine the valuations in valued policies, where an indemnity was honestly intended. 1 Marsh. 202.

We shall confine ourselves to the case immediately before us. We mean to give no opinion, whether the apprehensions of Marshall, as to the true intention of the English statute, are well or ill founded.

The Chief Justice during the argument, conveyed the sentiments of the whole court. We have adopted the policy and principles which gave rise to the act of parliament, both in courts of justice and by commercial usage; but we are not prepared to say, that every particular provision or resolution under it, has been engrafted into our system of law. An insurance amongst us, is a contract of indemnity. Its object is, not to make a positive gain, but to avert a possible loss. A man can never be said to be indemnified against a loss which can never happen to him. There cannot be an indemnity without a loss, nor a loss without an interest. A policy therefore made without interest, is a wager policy, and has nothing in common with insurance, but name and form. 1 Marsh. 30, 97. It is not subservient to the true interests of fair trade and commerce; but is pregnant with as much mischief, both public and private, as can proceed from any species of gaming, which the legislature has hitherto found it necessary to repress. *Ib.* 98. Every species of gaming contracts, wherein the insured having no interest, or a colorable one merely, or having a small interest, much over values it in a valued policy, under the cloke of insurances, are reprobated both by our law and usage.

It is obvious, that if the mercantile practice of this port has been sufficiently established, that profits are understood to be insured under the character of goods merely, an end is at once put to the present question. Because \$3817 44 could not be deemed an extravagant profit on the cargo, at a West India market. But independent of this usage, does not the case itself present such outlines as to evince, that the cargo has been but little over valued? Two voyages were meditated by the insured, "at and from Philadelphia, to one port in Martinico, and at and from thence to St Thomas's," and the defendants subscribed the policies on the brig and cargo for both voyages, and received a premium proportioned to the risk. Admit the freight of the vessel was not insured, still the aggregate amount of the prime cost of the goods, premium, and of the expenses

necessarily attendant on the transportation of the goods to Martinico, formed a fair object of insurance.

The plaintiffs do not seek an indemnification in the light of ship-holders for the loss of their freight, but as owners of the cargo, for the additional cost of conveying it to Martinico. This appears to be a fair and honest transaction, without any kind of misrepresentation. It possesses no single feature of a gambling policy. The defendants have received the large premium of \$3501 on both policies, on the entire valuations, and are therefore bound to make up the whole loss. Should a different doctrine prevail, a valued policy, instead of operating as an admitted agreed value of the property on the trial, would be of no possible use, but an injury to the insured. If the voyage should be safely performed, the underwriters would retain the full premium on the whole valuation; but if it should be unsuccessful, the insured would only recover the amount of the first cost of the goods put on board, with the proper premium thereon. These remarks go on the ground of the insurance being intended as a real indemnity, and not where the policy has been effected on gaming principles.

The jury found a verdict for the plaintiff for \$4812 $\frac{1}{2}$ without leaving the bar.

RESPUBLICA *against* ABRAHAM DEAVES.

The valuation by the assessors under the law of 11th April 1799, is binding on the county commissioners, and they cannot revise or alter it.

CASE stated for the opinion of the court.

The commissioners of the county of Philadelphia, at the time and in the manner prescribed by the late act, entitled "an act to raise and collect county rates and levies," proceeded to make an estimate of the probable expenses of the county for the year 1802, which estimate amounted to \$50,000, and thereupon issued their precepts to the respective township assessors, requiring them, in the usual form, to make out a just and perfect return of the names of all the taxable inhabitants within their wards, townships or districts respectively, and of all the property made taxable by the 8th section of the said act, together with a just valuation of the same.

The annexed schedule exhibits a view of the assessments on the several wards and townships, as returned by the said assessors.

[This assessment respected all the city wards, and townships and

districts in the county ; but extracting therefrom the assessments of three townships, it appears that the amount of real estates, exclusive of slaves, horses, and horned cattle.

	in Germantown township was	\$56,937
Do.	in Bristol township,	105,857
Do.	in Oxford township,	148,497
But including slaves, horses, and horned cattle, the amount		
	in Germantown township was	\$881,132
Do.	in Bristol township,	114,022
Do.	in Oxford township,	157,132]

Upon the receipt of such returns, the commissioners proceeded to quota the several townships, respectively, agreeably to the annexed schedules.

[Whereby Germantown township was quoted at	\$8612 64
Bristol township at	467 49
Oxford township at	644 24]

And thereupon accurate transcripts were made out by the clerk, and delivered to the assessors or collectors within the time and in the manner directed by the said act of assembly ; and at the times appointed for hearing appeals, the appeals of many individuals were heard, and deductions made according to the judgment of the commissioners.

The inhabitants of the township of Germantown generally objected to, and complained of the quota apportioned on their township, as being greater than their proportion of the county burthens, and claimed that the average rate per cent. so far as it relates to their township, should be reduced to a centage or proportion, which would equalize them with the other townships in the county, according to the proportions they have heretofore borne, making just allowance for the increased or diminished value of property. To this the commissioners assented, but differed as to the rate.

The schedules annexed show the quotas which have been fixed in the several townships of Philadelphia county for the last seven years.

[Whereby it appears, as to the above mentioned three townships, as follows : Germantown, viz.

1796.	1797.	1798.	1799.	1800.	1801.	1802.
\$ 1085 36	1221 30	1531 36	1825 26	730 10	1095 15	8612 64
		<i>Bristol, viz.</i>				
\$ 364 80	427 55	535 27	656 50	263 00	394 50	467 49
		<i>Oxford, viz.</i>				
\$ 642 67	742 64	931 10	1041 26	416 50	624 75	644 24]

The assessments on the several townships (including the township of Germantown till the present year 1802) have been made, according to

what was considered by the assessors as the real value of the property ; but two third parts have been uniformly struck off by the assessors from such assessments, when returned by the assessors to the commissioners ; and they have always acted heretofore on such returns. But the assessors for the township of Germantown have, in the present instance, returned their assessment without such deduction.

The average rate per cent, on the real property in the said county, to raise the sum required for the current year, is 41 cent in every 100 dollars.

The tax on personal property in each township is deducted, and the centage or average rate is struck on the balance, so that as there is more or less personal property assessed in each township, the centage or average rate is increased or diminished.

The average rate per cent, in Germantown is 87 cents, in Bristol 49 cents, in Oxford 32, cents, and the average rate per cent. in the other townships, as marked in the duplicates.

Notice was given to each taxable inhabitant, of the amount of the sum he stood rated for, and the rate per cent. and of the time and place of appeal.

The following questions are submitted to the opinion of the court :

1st. Is it the intent or meaning of the act of assembly, that the county taxes should be equally laid on the inhabitants and property in the respective townships, as far as circumstances will admit ?

2d. If from the different modes of returning the assessments, an inequality of taxation would ensue, by applying the same average rate per cent to all the respective townships, have the commissioners power to alter the average rate in the different townships, or in any other manner to equalize the tax ?

If the court shall decide both the above questions in the affirmative, then judgment to be entered in favor of the defendant ; otherwise, in favor of the commonwealth.

Mr. Rawle for the defendant. It is admitted in the state of the case, that Germantown township is greatly overrated. While other township assessors have struck off two thirds of their valuations, those of Germantown have returned their assessments of the real value of the property, without such deduction. The peculiarity of their situation rests in this ; that they have been oppressed by their strict adherence to the true spirit and words of the law.

It appears by the schedules annexed to the case, that the following quotas have been assessed by the commissioners, on the city and

county of Philadelphia, from the year 1796, to the year 1802 inclusive :

Triennial assessment for 1796,	.	.	\$80,000
1797,	.	.	85,000
1798,	.	.	45,000
1799,	.	.	50,000
1800,	.	.	20,000
1801,	.	.	30,000
1802,	.	.	50,000

By taking a comparative view of the quotas assessed on the townships of Germantown, Bristol and Oxford, in 1799 and 1802, when the like sum of \$50,000 was to be raised in each year, we shall find, that the rates of Germantown were almost doubled, while in Bristol they were reduced almost one third, and that in Oxford they were reduced more than one-third. Other great inequalities will appear on a comparison of the assessments, in other years, made in the same three townships, as well as in the other townships, districts and wards in Philadelphia county. Common justice demands, that if an error has slipped in, it should be rectified, if it can be effected consistently with the true spirit of the law.

On the first question submitted, there can be no possible doubt. But the second will require a particular review of the former acts on the subject.

The old law "for the raising of county rates and levies," was passed March 20th 1724-5. Prov. Laws 209, Gallow. edit. (101, Miller's edit.) By this act, the constables were to bring in true certificates of all taxables in each county, and the assessors were equally and impartially to assess the taxes. The collectors are required to give notice of the day of appeal, and the party grieved might appeal to the commissioners, who are empowered to diminish or add to such person's rate, as to them shall seem just and reasonable. And the commissioners upon hearing of the appeals, "shall rectify and adjust the said assessments, by abating or adding to the sums contained in their respective duplicates," &c. By the 9th section of a law passed since the revolution, on the 19th December 1780, (Loose Acts, 402,) the office of city and county assessor was abolished. A supplement "to the several acts for raising county rates and levies," was passed on the 3d April 1792, and expired on the 31st December 1798. 3 St. Laws, 206.

The first triennial law, "to regulate the mode of assessing and collecting county rates and levies," passed on the 17th April 1795. 3 St. Laws, 745. By § 1, three assessors and as-

sistants are to be chosen in October then next, and triennially ever after in the respective counties; who by § 8, are to take a full account, and return to the commissioners a just and faithful valuation of the estate and interest of the several owners. By § 4, the commissioners shall examine and compare the returns made to them, and have power to revise, alter and adjust the valuation in such returns, provided that in so doing, the relative value of the property in the same township, ward or district shall not be changed. And by § 6, after the commissioners have ascertained the amount of the tax to be raised for the ensuing year, they shall calculate and apportion the sum of such tax to be charged on every owner, according to the valuation in the next preceding triennial assessment and return, and the corresponding rate or poundage settled by the commissioners.

Then follows the law, on which the question arises, passed on the 11th April 1799. 4 St. Laws, 508. It reduces the different laws into one act, and by § 4, provides for the election of three assessors and assistants. The § 7, is most material. The commissioners shall make an estimate of the probable expense of their counties for the ensuing year. On their precept, the assessors shall return the names of all taxable persons, and property made taxable. On receipt of such return, the commissioners shall proceed to *quota* the townships respectively, agreeably to the quantity and quality of land and other taxable property; and when completed, shall send transcripts to the ward or township assessors or collectors respectively, with the average rate per cent in each township, &c. Notice shall be given of the time when and where an appeal will be held; and on the appeal, the commissioners shall grant such relief, as to them shall appear just and reasonable, but shall not make any allowance or abatement on account of any real property in any other year, than when a triennial return and assessment is taken and made, except in case of fire to buildings or other improvements.

By § 8, the assessors shall value the property, to the best of their ability and judgment, for what they think it will *bona fide* sell for in ready money, &c.

To this last direction, the assessors of Germantown, have religiously conformed, and the inhabitants of the township are in danger of suffering unreasonably thereby. It is not denied, but the power of the commissioners under the former laws is more fully expressed, than in the present. Still it is apprehended, they possess the right of equalising the common burthen. They are impowered to *quota* the townships respectively agreeably to the quantity and quality of land and other

taxable property. The proviso in the close of § 18, is, that no tax in any county, shall in one year exceed the rate of one cent in every dollar of the adjusted valuation of the property, &c. Now there can be no adjustment, without a due authority to correct errors or all kinds, in the valuation. And the term *quota*, in Johnston's dictionary, is said to be "the proportion as assigned to each," and is equivalent to the words calculate and apportion in the act of 1795. If the commissioners have not a power of altering the average rate in the different townships, or of equalizing the tax in some other mode, the citizens of Germantown will be subjected to an unreasonable burthen, and be without remedy.

Mr. M'Kean, attorney general for the state. However hard the case of Germantown may appear, the inhabitants are not totally without blame; because it is stated in the case, that the commissioners assented to reduce the centage in that township on their complainant, but they differed as to the rate.

The point now is, can this legally be done?

It is conceded, that the powers derived by the commissioners under the acts of 1724 and 1795, are more full and ample than under the law of 1799. This must certainly have been by design of the legislature, who intended that the valuation of the assessors, should be obligatory on the commissioners. It would seem by the words of the law, that they might decrease, but not increase the taxes of an individual, on an appeal. It is directed by § 10, that the commissioners shall after the appeals are over, regulate the assessments, according to the alterations made. And it seems, as if the only remedy of the inhabitants of Germantown is by appeal.

By the court. An appeal to the commissioners can only remedy individual grievances; and the day of appeal is now passed. Undoubtedly the case of the citizens of Germantown is extremely hard; but if the legislature have not thought proper to empower the commissioners to revise and alter the valuation of the assessors, we cannot confer that authority. The valuation of the assessors seems binding on the commissioners, and it is only through the instrumentality of the former in making a new valuation, on the principles adopted by the other townships, that redress can be obtained. This will leave a deficit for the year 1802, which can be supplied by an additional sum for the present year. If this cannot be effected, Germantown has one resource, an application to the justice of the legislature.

JOHN JAMES *against* JOSEPH LYON and ABIGAIL his wife.

Baron and feme have issue, and mortgage the lands of the feme without acknowledging the same, the lands of the feme are bound only during the life of the husband.

Scire facias sur mortgage. On case stated.

The mortgaged said premises were at the time of the mortgage, and still are the estate of the defendant, Abigail Lyon, the wife of Joseph Lyon, who was married to the said Joseph before the time of executing the said mortgage, and had issue by him.

The mortgage deed was executed by the said Joseph and Abigail at the city of New York, but was never acknowledged by either party. Proof of the execution thereof was made by one of the subscribing witnesses before the mayor of the city of Philadelphia, *prout* mortgage deed and certificate of probate indorsed.

The question stated for the opinion of the court is, whether the said estate of the said feme covert is bound or affected by the said mortgage, further than during the life of the said husband?

W. Lewis and W. Franklin, *pro quer.*

W. Rawle, *pro def.*

Mr. Lewis being called on for the grounds on which he contended, that the lands of the feme were bound after the death of the husband, declared that the position could not be maintained with any plausibility.

The court being clearly of the same opinion, directed judgment to be entered for the defendants.

DAVID H. CONYNGHAM, devisee of JOHN M. NESBIT *against* the Commonwealth.

Inquisition on a claim against the state, upon an eviction of lands sold by the agents of forfeited estates under the act of 6th March, 1778, confirmed, though no possession had been delivered by the council, and the purchaser had failed in an ejectment commenced against an adverse claimant, by title paramount.

MAJOR Harry Gordon, of the British army, was attainted of high treason, under the name of Henry Gordon, by a proclamation of the Supreme Executive Council, dated 20th March 1781, requiring him to surrender himself for trial by the 1st November following, founded on the law of 6th March 1778. 1 St. Laws 750.

Major Gordon was entitled by patent, dated 17th May 1774, to 1497 acres of land in Frankstown township, in Bedford county, which were afterwards in 1782 sold by the agents of forfeited estates to James Woods, and on the 18th April 1782 they received 2005*l.*, the consideration thereof. Between the times of signing the preliminary articles of peace between the United States and Great Britain, on the 30th November 1782, and the definitive treaty of 3d September 1783, to wit, on the 31st January 1783, an act of assembly passed to cure the misnomer of Gordon, who was called on to surrender himself by the name of Henry instead of Harry, 2 St. Laws 87.

On the 2d October 1783, the Supreme Executive Council, by their president, conveyed by patent the 1497 acres to James Woods, who on the same day conveyed the premises to John Maxwell Nesbitt, who afterwards, by will, devised the same to the aforesaid David H. Conyngham.

On the 26th October 1774 the agent of major Gordon leased the lands to Peter Titus. He was intermarried with the sister of James Karr, who was brought up by him and lived with him as an inmate. They had separate stocks afterwards, but Titus managed the farm.

Nesbit commenced an ejectment against Peter Titus and James Karr to April term 1789, in Huntingdon county; and pending the suit, Karr intermarried with the daughter of James Ranken, who claimed 300 acres of the land sold by the agents, under a warrant of 3d February 1755, under which no survey had been made, but which was seven years older than the warrant under which the land was first surveyed. The ejectment first came on to trial on the 4th May 1793, before M'Kean, late Chief Justice, and Yeates, when a verdict passed for the defendants, against the charge of the court, and the court in the bank awarded a new trial, without costs.

It was tried a second time at Nisi Prius, on the 16th May 1797, before Shippen and Smith, Justices, and a verdict given for the defendants, against the charge of the court, on which a second new trial was ordered in the bank, without costs.

It was finally tried at the last Circuit Court at Huntingdon, on the 16th May 1802, before Yeates and Brackenridge, Justices, who differing in their opinions on the title, a verdict and judgment was rendered for the defendants.

Conyngham, as devisee of Nesbit, having filed a claim against the commonwealth, under the 9th section of the act of 24th March 1779, (1 St. Laws 793) for the value of 282½ acres and allowance, of which he supposed Nesbit had been evicted or dispossessed by the above judgment, an inquest was awarded by the court to ascertain the same, and

the inquisition, under the hands and seal of the sheriff and jurors, was now returned, valuing the same at 2179*l.* 10*s.* 7*d.*

Mr. M'Kean, attorney general, in behalf of the state, objected to the confirmation of the inquisition on two grounds.

1st. It is directed by the law of 6th March 1778, § 12, that the president or vice-president in council shall cause the possession of the lands and interests, sold by the agents of forfeited estates, to be delivered to the buyers or their assigns. But here no requisition has been made to the council or executive authority, by Woods or those claiming under him, for this purpose. And there are many cases wherein one may defend a possession in ejectment, and yet not be entitled to recover as plaintiff.

2d. The provision in the 9th section of the act of 29th March 1779, respects only the case of purchasers of the estates of any convicted or attainted traitor, evicted or dispossessed by judgment under a title paramount, in an ejectment against such purchaser, his heirs or assigns, or his or their tenants, within twenty years after sale, &c. Now here no suit was brought against Nesbit, but he was himself the lessor of the plaintiff.

Besides, though the purchaser is to be paid the value of the estate at the time of the eviction, yet he can have no claim to improvements made by the adverse party; and moreover, he should make a re-conveyance of the lands of which he has been evicted, before he obtains the decree of this court, for the value thereof, to be paid out of the treasury of this commonwealth.

He concluded that the legislature only were competent to grant relief, in the present instance.

Mr. Ingersoll, for the claimant, answered, that circumstanced as this case is, it would have been idle to have called on the executive to give possession to the purchaser, when it was known that Titus, the tenant of Gordon, lived on the lands at the time of the sale. It could not be known that he would basely have surrendered up the possession to the adverse claimant, until a variety of unsuccessful efforts had been made to obtain possession; and finally, the vendee of the purchaser was compelled to bring his ejectment.

But I am willing to take up the first objection as an abstract legal question, detached from other facts. When it is said in the act of 6th March 1778, that the council should give possession of the lands sold, it must be understood, that there must not be an adverse possession at the time. It could not mean that the vendee should be put in by force, and with the *posse comitatus*. One instance indeed pre-

sents itself of such an attempt. It was in the case of Hog Island, sold as the property of Joseph Galloway to Thomas Barclay ; but Gen. Thomas Proctor, the adverse claimant, had a field piece drawn to the spot, and resisted the force. The agents of the Supreme Executive Council were thus foiled ; but they would certainly have persisted, if it had been thought by government that such violent measures had been justifiable. The construction I contend for is analogous to that put on the law of 1705, “for taking lands in execution for payment of debts.” 1 St. Laws 67. There strong words are used by the legislature, of delivering over the lands of the debtor to the purchaser by the sheriff ; but the construction always has prevailed, that in case of an adverse possession, the purchaser is put to his ejectment. Many counsel have thought, that if it had been *res integra*, and the debtor had continued in possession, the sheriff might have dispossessed him, but not a third person, in favor of the purchaser, as on a *facias* in England, in the case of a term levied on ; (Per Buller. 8 Term Rep. 298) but a different interpretation having generally prevailed, the legislature found it necessary to pass a law on the subject on the 6th April 1802, “enabling purchasers at sheriff’s or coroner’s sales to obtain possession.” 5 St. Laws 266.

But if the legislature had even intended to have given the council this power of taking possession by force, and had thus infringed the sacred right of a citizen to a trial by jury, the law would have been unconstitutional and void, according to the opinion of this court, delivered by Yeates, J. in the case of Austin’s lessee *v.* Baker, on the act of the 6th August 1784, and which was afterwards repealed on the 18th February 1785. All that the legislature could do in such a case would be, to empower the council to transfer the legal interest of the traitor to the purchaser, and to deliver to him the possession, if vacant ; but if the possession was withheld by another, the right there-to must necessarily be subject to judicial decision.

2d objection. It is true, that the literal expressions of the law of 29th March 1779, respect ejectments brought against the purchasers, their heirs or assigns ; but the spirit and equity of the act reaches to cases, wherein they have brought suits against adverse claimants. The legislature intended to indemnify such purchasers against persons claiming lands by title paramount to the traitors ; and in this view, it can be of no moment who commences the action, provided it be done within 20 years after the sale by the agents. I have attempted to show, that the buyers are not entitled to be put into possession by force, and they have no alternative except bringing a suit at

law. If they had, after paying their money into the coffers of the state, represented to council that their contract should be rescinded and the money repaid to them, on account of their inability to deliver the possession, they would naturally have received for answer, that the merits of the contending titles must be tried at law before such a measure could be adopted. It cannot be said that Mr. Nesbitt has been negligent or inactive in pursuing his right. Thirteen years has he waged a legal warfare against the obstinate prejudices of a whole county, though to him the uniform result has been expense and vexation. The words are in the disjunctive, evicted or dispossessed.

As to the improvements they have been but trifling ; they were made by the tenants of Gordon, and those who originally came into possession under them ; and if Nesbitt's title had been sanctified by a recovery, he would have been entitled to all the improvements on the lands in controversy. The words of the law are, " that the person evicted, his heirs or assigns, shall be paid the value of such estate, at the time of eviction."

There will be no difficulty as to the re-conveyance to the state if the court shall deem it necessary ; but it should be given at the time the money is paid.

The court declared, that there should be a re-conveyance made to the commonwealth of the 282½ acres, and were unanimously of opinion in favor of the plaintiff on both points.

Inquisition confirmed.

**The Mayor, Aldermen and Citizens of Philadelphia *against*
JOHN NELL.**

Mayor's conviction under a city ordinance for huckstering, must charge the defendant as a huckster with selling or offering for sale at second hand within the market. It must appear that the offence was committed within the city, and that the defendant was convicted of the offence.

Quære. Whether, if the warrant be not issued in the name of the commonwealth, the exception be not fatal ?

CERTIORARI to John Inskeep, esq. mayor of the city of Philadelphia, to remove all proceedings before him, respecting the conviction of the defendant for huckstering.

The mayor returned thereon his warrant, issued in his own name, against the defendant, to answer the mayor, aldermen and citizens of Philadelphia, for a debt under 40s. for huckstering, contrary to a city ordinance, dated 29th November 1800, and the following transcript of his proceedings :

The Mayor, Aldermen and Citi- }
zens of Philadelphia, }
v. }
John Nell. }

Huckstering.
Capias debt under 40s.

The defendant was brought before me, and was charged in his presence, on the affirmation of William Johnston, one of the clerks of the High street market, with being a person who follows the business of a huckster, and selling provisions at second hand; and that the defendant's wife sold this day, in the presence of the defendant, butter, nuts, &c. contrary to an ordinance of the corporation in that case made and provided. The defendant alleges that he sold as agent. Jacob Underwood, on his oath declared, that he was present when Abraham Stowhert left with the defendant in Germantown, on the 27th inst. 69lbs. of butter, and 3 bushels of nuts, which he desired the defendant to bring to market to sell for him, but did not know that it was the same butter and nuts that the defendant sold this day. I therefore adjudge, that the defendant pay a fine of five dollars; warrant and serving 1s. 9d, judgment 1s. 6d., amount 8s. 3d.

The defendant paid the fine and costs.

JOHN INSKEEP, Mayor.

The provision against huckstering is contained in the 16th section of a city ordinance, enacted on the 29th March 1798, and is in these words :

“ No person who follows the business of a huckster, or of selling provisions, vegetables, nuts or fruit, at second hand, shall at any time sell, or offer for sale, within the limits of the market, any provisions, vegetables, nuts or fruit of any kind, under the penalty of forfeiting for every such offence the sum of five dollars, to be recovered and appropriated as herein before directed.”

Several exceptions were taken to this conviction.

1. The conviction ought to have been in the present tense. 2 *Ld. Raym.* 1376. *Stra.* 608.

2. The conviction ought to be on an information or complaint precedent.

3. It does not appear that he was guilty of any offence. The defendant is an inhabitant of Germantown township, and never purchased provisions within the city or within four miles of the county court house in the city, and sold the same provisions within the city or elsewhere, within the four miles. It is true, he is said to have been charged with being a huckster and sell-

ing provisions at second hand. But it rest merely on the charge without any proof. All acts which subject men to new and other trials, than those known at the common law, ought to be taken strictly. It must appear on the face of the proceedings, that the fact was an offence within the act, and that the justices have proceeded accordingly. 2 Salk. 578. 1 Ld. Raym. 581.

The construction which has been put on this by-law, is a very unreasonable and rigid one, excluding all persons whatever from the sale of articles, which they do not themselves raise. But the legislature by a late act, passed on the 6th April 1802, have now legalized the sale of provisions, vegetables or fruit, in the markets of any city or corporate town, provided they shall not have been previously purchased within their limits. 5 St. Laws, 265.

4 The offence of huckstering should be proved to be within the jurisdiction of the mayor. It is not even charged to have been within the limits of the city. A corporation can make no by-laws to operate beyond its bounds. 8 Mod. 159.

5 The evidence is not set forth with convenient certainty, ascertaining the particular manner of the offence. It is necessary to set out the evidence, that the court may judge whether the justice has done right. 2 Barr. 1163. 4 Burr. 2063. 1 Stra. 497. And surplusage in a conviction, will not violate it. 4 Term Rep. 767. The court in its discretion, may grant or refuse a *certiorari* to remove a conviction before justice of the peace. If B. R. see that the justices have drawn the proper conclusion from presumptive evidence, they will not grant a *certiorari* to remove the conviction.

6 The defendant was not called upon to answer the charge or plead to it.

This exception was in a great measure waived.

7. Here is a judgment, without a conviction to warrant it. A conviction is equal to a verdict and judgment, and where a forfeiture is the penalty of the offence, such judgment must be given. 2 Burr. 1166.

8. Costs are awarded, which are not warranted by the ordinance. To the penalties inflicted on the offences described in the 2d, 4th, 7th, 8th and 9th sections of the by-law, costs are superadded; but from the 10th to the 17th section inclusive, costs are not mentioned. A common informer can in no case recover costs, unless expressly given by statute. Bull. 333. Hullo. on Costs, 19, 200-1.

9. There is a misnomer of the corporation. The name of the corporation in 2 St. Laws, 654, § 2, is ascertained to be, "the mayor,

aldermen and citizens of Philadelphia." The name of a corporation, is essential to its taking. Gilb. Hist. C. B. 225. They must sue and be used by their proper name. Ib. 234, 235. And such are the words of the acts of incorporation.

But this exception being applicable to other convictions removed at the same time, and not to the present, was waived by the defendant's counsel.

10. The process was erroneous, which issued against the defendant. By the 12th section of the 5th article of the state constitution, "the style of all process shall be, the commonwealth of Pennsylvania." But in this instance, the warrant issued in the name of John Inskeep, mayor of the city of Philadelphia. This objection was strongly relied on; and it was urged, that this point had lately been so determined in the Common Pleas, by Mr. Justice Coxe, president of the first district, on solemn argument.

Finally, it was insisted, that where a special power is given to a justice of the peace by statute, to convict an offender in a summary manner, without a trial by jury, it must appear, that he hath strictly pursued that power; otherwise the common law will break in upon him, and level all his proceedings. The justice must consider himself only as constituted in the place both of judge and jury. 1 Burn's Just. 400, (14th edit.) Every conviction must state the offence with the highest certainty; and the defendant can have no remedy against it, but from some defect appearing in the face of it. 2 Haw. 250.

The whole court were clearly of opinion, that the third, fourth and seventh exceptions, were substantially fatal. It ought to have appeared, that the defendant was charged as a huckster, with selling at second hand, or offering for sale within the limits of the market, provisions, &c.; that the offence was committed within the city, within the jurisdiction of the mayor; and that the defendant was convicted of the offence.

They were silent as to the other exceptions, except the tenth: on this, it was remarked, that the warrant of a mayor, justice, &c. was rather a precept than process: that almost all the warrants since the revolution, run in a style similar to the present; and that even *venire facias's* for holding Courts of Oyer and Terminer and General Gaol Deliverey, being considered in the light of precepts had been made out in the name of the judges of this court, until very lately, when the form was changed. But the court declined giving any decided opinion on this exception.

The judgment of the mayor in the principal case was revers-

ed; and also several other judgments against other defendants, were reversed for similar exceptions.

Messrs. Ingersoll and Dickerson, *pro quer.*

Messrs. M'Kean, Rawle and Porter, *pro def.*

MARGARET BURGINHOFEN *against* THOMAS MARTIN.

Court in examining the proceedings of justices of the peace, will call in the aid of affidavits, to see whether they have exceeded their jurisdiction. Supreme Court have the power of reviewing their proceedings, in cases where no appeal is given to the party. Their jurisdiction is only abridged by the express negative words of a statute.

Certiorari to John Huston, esquire, one of the justices of the peace of Philadelphia county.

To this, a short return was made. That on the 27th September 1802, a warrant issued for a debt under 40s. Judgment was given for the plaintiff for 1l. 11s. 10½d. debt, and 8s. 6d. costs, and that execution issued on the same day against the defendant.

Mr. Ingersoll for the defendant objected, that this was the case of rent, and that the jurisdiction of justices of the peace, in such cases, was at an end, on the 27th September 1802, when the warrant issued. The act of 1st March 1799, in the 2d section, gave jurisdiction to justices of the peace, where the rent did not exceed 53½ dollars; but by the limitation in the 8th section, it expired on the 6th April 1802, Consequently, the proceeding was *coram non judice*, and merely void.

Mr. Rawle for the plaintiff, answered, that it did not appear on the face of the proceedings, that the demand was made for rent; and that the fact was not admitted by him.

Per cur. Then the fact must necessarily be ascertained by affidavits, to be laid before us.

Shippen, C. J. added. It is justly taken for granted by the counsel in this court, that we possess the power of examining the proceedings of justices of the peace, in cases where the demand is under 40s., though the law does not give the party an appeal to the Court of Common Pleas. This point was solemnly determined by Kinzey, Chief Justice many years ago, on a suit brought by Samuel Hasell, treasurer of the city corporation, on a bye-law for measuring grain. The jurisdiction of superior courts, is only abridged by the express negative* words of

*B. R. is not ousted of its jurisdiction but by express words, as where a statute says, such a matter shall finally be determined by the Quarter Sessions only, and that no other court shall intermeddle, *certiorari* lies notwithstanding these negative words. 2 Barr. 1042. 1 Bl. Rep. 281. T. Jon. 58. Sav. 134.

a statute. To prevent gross injustice in a variety of instances, the power of reviewing the acts of inferior tribunals must necessarily be exercised by the Supreme Court.

SAMUEL WALKER, administrator of **STACEY WALKER**, appellant *against*
JOHN SMITH, appellee.

One died in 1798 intestate, unmarried, without father, mother, brother or sister, leaving uncles and aunts on the father's and mother's side, and the issue of some who were dead, the whole estate goes to such uncles and aunts and the issue representing such as are dead, equally.

THIS was an appeal from the decree of the Orphans' Court of Philadelphia county, and came before the Supreme Court on a case stated as follows :

Joseph Walker, senior, and Stacey Walker his son, both died in the month of September 1798, the former on the 18th and the latter on the 25th September. Stacey was the only child his father ever had. They both died intestate. Stacey, by the death of his father, became entitled to all his real and personal estate.

The personal estate, after payment of debts, amounted to \$6008¹⁴/₁₀₀, and a house and lot of ground in the Northern Liberties of Philadelphia, since sold for \$800, descended to him from his father.

Stacey Walker, at the time of his death, was possessed in his own right of personal estate, after payment of his debts, to the value of \$3124⁴⁶/₁₀₀, independent of what descended to him from his father's estate as above mentioned.

Joseph Walker, the father of Stacey, had been a widower for many years preceding his death.

Stacey Walker was never married, and at the time of his death had the following kindred on the part of his father, viz. and uncle, Robert Walker ; the children of another deceased uncle, named George Walker, two in number ; the children of another deceased uncle, named Emanuel Walker, five in number ; and three aunts, all of which uncles and aunts were of the whole blood of Joseph, the father.

And at the time of the death of the said Stacey Walker, there were alive the children of an aunt on his mother's side, who had married Tristram Smith, and her husband is now alive, but she died before Stacey Walker ; and one brother of his mother viz : Stacey Beakes, who died about six months since. The place of his late residence is uncertain, but it is supposed he left children.

The questions submitted to the opinion of the court are,

1st. Whether the uncles and aunts of the said Stacey Walker, on the part of the father of said Stacey, under the intestate laws of Pennsylvania, are not entitled, in a course of distribution, to the whole of the real and personal estate descended to the said Stacey Walker from his father Joseph Walker, and also to all the personal estate he was possessed of in his own right, independent of that which descended to him from his father, to the exclusion of the brothers and sisters on the part of Stacey's mother, or the children who have survived them?

2d. If Stacey Walker's uncle and aunt, (or her husband or children,) on the part of his mother, are entitled to any part of the real or personal estate so descended to him from his father? Also, what proportion, if any, of the personal estate he had independent of his father's estate?

John C. Wells, in behalf of those claiming on the part of and as kindred of the father of Stacey Walker.

Jared Ingersoll for the kindred on the part of his mother.

The Orphans' Court decreed, that the uncles and aunts surviving, and the children of such as were dead, as well on the part of the mother the part of the father, should inherit the whole estate of Stacey Walker equally.

The appeal was now argued by Messrs. Rawle and Wells on the part of the appellant, and by Mr. Ingersoll on the part of the appellee.

For the appellant. By the old act of 1705, "for the better settling of intestates estates," it is provided by § 2, that in case the intestate leaves no wife nor child, then the surplusage of his estate shall go to the next of kindred in equal degree of or unto the intestate, and their legal representatives, and in no other manner whatsoever. 1 Dall. St. Laws, Append. 44.

This law was repealed by the act of 19th April 1794, 3 St. Laws 521, which introduces many alterations in the former code, by taking away (amongst other things) the double share of the eldest son of the intestate, and letting in the half blood to inherit the real estate. It drops in § 3 the words next of kindred, used in the old law, and introduces the words all of equal degree of consanguinity. The 7th section is highly material. Where there is no widow, issue, nor father, but a mother, the whole of the real estate shall be enjoyed by the mother of

the intestate during her life, and the personal estate be absolutely vested in her, unless they, or either of them, came to the intestate from the part of his or her father, in which case it shall descend and be enjoyed as if the intestate had survived his or her mother. This section points to the source from which the estate, real or personal, is derived, and makes a correspondent provision. But would it not be monstrous to suppose, that Stacey Walker's mother, if living, was interdicted from taking any part of the real or personal estate which descended to him under his father, and yet that her sister, who derived her claim under and through her, should take a share thereof! Can the legislature have intended so gross an absurdity!

By § 11, where the intestate leaves no children, nor lawful issue, father or mother, brothers or sisters, or their lawful issue of the whole blood, then brothers and sisters of the half blood and their issue shall inherit their estate, in preference to the more remote kindred of the whole blood, unless where the inheritance came to the person so seized by descent, devise or gift of some one ancestor in which case, all those who are not of the blood of such ancestor, shall be excluded from such inheritance.

The whole law must be taken together, to avoid absurd inferences therefrom. The introduction of sections is not absolutely necessary to the exposition of statutes, though they have their advantages. The last words of § 11 must be considered as running through the whole act, and show the intention of the legislature that the whole blood shall exclude the half blood. It is practically easier to find out the relations on the part of either of father or mother than of both.

The words next of kindred are introduced for the first time in § 12 of the act. Where there are no widow, lineal descendant, father or mother, brothers or sisters of the whole or half blood, or their lawful issue, then the real and personal estate of the intestate shall be divided among the next of kin of equal degree, but this does not take away the force of the preceding sections. If it was otherwise, the consequence would be that a mother would be excluded, while her sister, brother, nieces or nephews would be let in. But it must be admitted, that if § 12 is to be considered as detached from and unexplained by the preceding sections, then we fail in our appeal.

The § 5 of the supplementary act of 4th April 1797, 4 St. Laws 158, keeps up the distinction in § 7, of the original law. If any intestate shall die seized of real estate in fee simple, and leave no widow, issue, father, brother, sister or their representatives, then the said estate shall be vested in fee simple in the mother, unless where the estate has descended so the part of the father, and § 7 further preserves the distinction.

The succession to estates is a creature of civil polity. 2 Bl. Com. 211. But statutes made *in pari materia*, shall explain each other. 4 Bac. 646. In doubtful cases, the construction of a statute may be extended, according to the reason and sense of the law makers either expressed in other parts of the act itself, or guessed at by considering the frame and design of the whole. 11 Mod. 161. 1 Dall. 434. Judges have expounded the words of an act contrary to the text to make it agree with reason and equity. 19 Vin. 514. 1 Dall. 478. In the supplementary intestate act of 23d March 1764, *and* was construed *or*. 1 Dall. 178. The true intention and meaning of the legislature must be consulted; and to form a correct idea of it in the present instance, the whole of the two last intestate laws must be considered as a system.

For the appellee. Stacey Walker died intestate unmarried, without father, mother, brother, or sister; and the question is, who shall inherit his property?

The law is its own best expositor; and we apprehend, has legislated for the particular case. But if it was *casus omisus*, it is not the province of the court to supply the defect. They can construe, but not make laws. The legislature meet annually; and if the intestate act requires amendments, they only are competent to make them.

The different provisions of the two late intestate acts, so far as they relate to the present subject shall be examined. The title of the law of 19th April 1794 is "an act directing the descent of intestate's real estates, and distribution of their personal estates, and for other purposes therein mentioned." § 1, directs the taking of bonds on granting letters of administration. § 2, directs, how long the debts of deceased persons shall be a lien on their estates.

§ 3. Prescribes the descent and distribution, in cases, where the intestate leaves a widow and lawful issue.

§ 4. Where there is no widow, but issue; and where there is a widow, but no issue.

§ 5. Where there is no widow or issue, but a father; in which case the whole of the real estate goes to the father during life, and the personal estate absolutely. But if either estate shall come from the mother, then the father shall take no part thereof.

§ 6. Where there is no widow or issue, but a father and brothers and sisters, or the issue of such brothers and sisters, then after the death of the father, the brothers, and sisters and their issue shall hold the lands.

But where there are no brothers or sisters, or their representatives, but a father, then the estate shall go to the father in fee simple, unless where the estate has descended from the part of the mother, as aforesaid.

§ 7. Where there is no widow, or issue, or father but a mother, the whole of the real estate goes to the mother during life, and the personal estate absolutely; but if either estate shall come from the father, then the mother shall take no part thereof.

This provision is *in totidem verbis* with that made for the father in § 5. And the legislature must naturally have contemplated the case to arise, when the intestate would have near relations, as brothers and sisters; and that the estate in the usual course of things, would not go to distant relations. The event was to be in the life of the mother.

§ 8. Where there is no widow issue, or father, but a mother and brothers and sisters, then after the death of the mother, the brothers and sisters and their issue shall hold the lands. This corresponds with § 6, (which respects the father) in every particular, *mutatis mutandis*, except the last clause of that section, giving the lands to the father in fee simple, where there are no brothers or sisters, or their representatives.

§ 9. Respects advancements made to children, and

§ 10. Respects posthumous children.

§ 11. Has been fully detailed by the adverse counsel.

The concluding words have been much relied on, and are said to run through the whole law, and must be incorporated therewith. The slightest inspection will evince that this was not the intention of the legislature. They are preceded by the expressions, "in which case." What case? The law furnishes the answer. "Where the inheritance came to the said person "so seized, by descent, devise or gift of some one of his or her ancestors," the more remote kindred of the whole shall take in preference to brothers and sisters of the half blood blood and their lawful issue. The provision is confined to the case enumerated in the very section.

§ 12. Is a general clause providing for distant relations, and clearly embraces the principal case before the court.

Where the intestate leaves no widow, lineal descendant, father, mother, brothers or sisters of the whole or half blood, nor their issue, the real and personal estate shall go to and be divided among the next of kin of equal degree; the lawful issue of such deceased kindred to come in and take *loco parentis*, with the surviving kindred.

These words admit of no ambiguity. "Next of kin" have a certain, defined legal meaning.

It will be found, that the supplementary law of 4th April

1797, also enumerates cases, without laying down any general rule.

§ 1. Points out the proceedings, to compel executors and administrators to give security, &c.

§ 2. How their surities shall be made liable.

§ 3. How executors and administrators may settle their accounts and be discharged.

§ 4. Limits the time during which the debts of deceased persons shall remain a lien on their lands.

§ 5. Prescribes the descent of real estate and distribution of personal estate of intestates in the following cases :

Where intestate leaves a widow and no issue ; where a woman dies without and with a husband ; where there is no widow, issue, father, brother, or sister, or their representatives, but a mother ; where there is no widow, issue, father or mother, but brothers and sisters of the whole blood, or their issue, living some brother or sister.

§ 6. Enumerates the last case again, as to real estate, where there is no brother or sister of the whole blood living, but lawful issue of deceased brothers or sisters.

§ 7. Where there is no widow, issue, father or mother, but brothers and sisters of the whole and half blood, or their representatives ; and where there are no brothers or sisters of the whole blood, or their representatives, but brothers and sisters of the half blood, such half blood shall inherit the real and personal estate, except such parts of the real estate as came to such intestate by descent, devise or gift of some ancestor, &c., with the like words as are inserted in the close of section 11, of the act of 1794, and which have been before remarked on.

The remaining sections of this supplement throw no light on the subject before the court ; and it will appear, that as to the intestate's uncles and aunts, or their issue, this last law is wholly silent, and leaves them on the footing they were placed by the act of 1794.

As to what Stacey Walker, the son, acquired by his own industry, independent of what he took under his father, the argument has been in a great degree abandoned by the appellant's counsel. And is apprehended, there can be no legal ground of discrimination between such parts of his estate, and what descended to him upon his father's death. Circumstanced as the case is, the 12th section of the act of 1794, vests the real and personal estate in the next of kin of Stacey Walker, and his relations on the part of the mother, as well as on the part of the father, constitutes such kindred.

Viewing the case in the strongest light for the appellant, we cannot go further than to say, it was *casus omissus* ; and then the well known remark as to last wills are applicable, *voluit sed non dixit*.

The court unanimously affirmed the decree of the Orphan's Court.

THOMAS CUTHBERT and ANTHONY CUTHBERT, trustees for ELIZABETH BREWSTER *against* THOMAS CUTHBERT, ANTHONY CUTHBERT, HENRY DRINKER, GEORGE LUDLAM and THOMAS WHITE, executors of PETER KNIGHT.

Whether a legacy of government stock be specific or general must depend on the texture of the will and the circumstances of the case.

CASE stated for the opinion of the court.

On the 18th September 1798, Peter Knight made his last will, and therein, amongst other things, bequeathed as follows, after devising his real estates :

“ I also give to Thomas Cuthbert and Anthony Cuthbert, the dividends and income of \$8000 six per cent. stock debt of the United States, in the funds of the United States, to them the said Thomas and Anthony, their executors and administrators, for the separate use of my wife's niece Elizabeth Brewster, wife of William Brewster ; and upon this express trust and confidence, that they the said trustees receive the said dividends and income, and apply the same for the support of the said Elizabeth, and the maintenance and education of her children. And I also give the said trustees, their executors and administrators, the further sum of \$600, money on the same trust, and to the same uses to which I have given the income of the said \$8000, and in aid of and by way of addition to the said income. And I also give to the said trustees the principal of the said \$8000, as the same shall be paid off and discharged by the government of the United States to be held in trust and applied as I have before directed with regard to the dividends and income thereof.”

			\$8000
He devised to Doborah Newman the sum of \$2000			
of 6 per cent. of the United States absolutely.			2000
To John Knowles of 6 per cent. stock,			1000
To his son John Knowles	do.		1000
To John Hart	do.		1000
To John Wilkinson	do.		1000
To Rebecca Holmes	do.		1000
To Byron Wilkinson	do.		1000
			\$16,000

To Thomas Cuthbert of his deferred stock, and 200%.			
in money,	.	.	1000
To Anthony Cuthbert of his deferred stock and 100%.			
in money,	.	.	1000
To Grace Wagner of his deferred stock,	.	.	1000
To Jacob Wagner, esq, her son, do.	.	.	1000
To John Slater, jun. do.	.	.	1000
To Abraham Collins and Catharine his wife, do.	.	.	1000
			<hr/>
			\$6000
			<hr/>

Then follow a number of pecuniary devises.

"And all the rest of my estate, real, personal, or mixed, after my debts and funeral expenses, and the preceding legacies are paid, I give and devise one fifth part thereof to Daniel P. Knight, his heirs, &c., one fifth part to Deborah Newman, her heirs &c., one fifth part to George Ludlam and Lydia his wife, their heirs &c.; one fifth part to Thomas White and Margaret his wife, their heirs, &c.; and one fifth part to Grace Wagner, and her heirs, &c.; and I direct, that none of my legacies shall lapse by the death of any of my legatees in my life-time."

The testator Peter Knight, died in March 1802, leaving a large real and personal estate, more than sufficient to pay his debts and legacies; and by his will devised and bequeathed all the stock of which he was possessed, or to which he was entitled.

[The testator at the time of making his will and at the time of his death, was possessed of \$16,283 $\frac{52}{100}$ of nominal 6 per cent. stock, and of \$6087 $\frac{40}{100}$ of deferred debt of the United States, as appeared by his inventory, and the admission of the counsel.]

Between the date of the will and his death, the said testator received from the United States, the annual sums which were paid by way of reduction and gradual extinguishment of the stock given in trust for the said Elizabeth.

The question submitted to the consideration of the court is, whether the said Elizabeth Brewster is entitled to have the said dividends replaced and made up to her? Or if she is only to receive the said stock to which it was reduced at the death of the testator as aforesaid?

Mr. Milnor for the defendants argued, that the devise to Mrs. Brewster was specific. It cannot be collected from the words of the will, that it was the testator's intention that Mrs. Brewster should be allowed the dividends paid to him by the government, between the times of making his will and of his death. On the contrary it is expressed,

that the trustees shall receive the principal of the 6 per cent stock "as the same shall be paid off and discharged," &c. The will was inchoate when it was made, but consummate by the testator's death.

No event had happened which was unforeseen by him. He had been in the habit of receiving his quarterly payments, and must have known that the principal of his 6 per cent. stock was daily diminishing; for though he annually received 2 per cent of the original sum, yet his quarterly payments continued the same without subtraction. It is stated that the testator has bequeathed all the stock he was entitled to. On an accurate estimate, it appears that he was possessed of \$16,283 $\frac{52}{100}$ of 6 per cent. and devised \$16,000, leaving a surplus of \$283 59 cents; and that he was possessed of \$6087 $\frac{40}{100}$ of deferred debt, and devised \$6000, leaving a surplus of \$87 40 cents. He distinguishes between cash and the two species of stock, which were also of different value; and gives no more of the latter than was really his own property when his will was executed. These are of important consideration in the case. But if the plaintiff's construction prevails, there will not be enough personal property left to pay off the debts and specific legacies. Indeed with the same propriety that it is insisted, the 6 per cent should be made up to Mrs. Brewster, of the same value as they really were at the time of the will, it may be urged, that they should be replaced at the original net value, instead of the nominal sum of \$8000, at the time of his death. But this is not pretended to be his intention. If he meant that the trustees should be paid the value of the stock when the was made, it would have been easy to have expressed it. If it is contended that the residuary clause prevents the legacy from being considered as specific, my answer is, that it naturally refers only to the pecuniary legacies.

It is laid down in *Avelyn v. Ward*, 1 Ves. 424, that legacies of stock, or annuities in the public funds may, according to the circumstances of the case, be considered either as specific or general, and consisting only in quantity. In *Sleech v. Thorington*, 2 Ves. 263, there was a devise of 2413*l.* 13*s.* in South Sea annuities; and though the testatrix at her death, was possessed of but 2157*l.* 12*s.* 1*d.*, yet as she was supposed to have apprehended that she had more, it was decreed to be a devise of the identical individual thing. So in *Ashton v. Ashton* 3 Wms. 384, there was a devise of 6000*l.*, South Sea stock, and he had only 5360*l.*; the latter sum was held only to pass, and the rest of the testator's personal estate was not obliged to make up the 6000*l.* But it would have been otherwise, if the testator had no stock at all. So in *Jeffreys v. Jeffreys*, 3 Atky. 120, where the tes-

testator devised 2702*l.* 3*s.* capital stock of the bank of England, and afterwards sold 702*l.* 3*s.* thereof, it was decreed, that as he had the stock at the time of making his will, he meant to give that very individual stock, and it was an ademption *pro tanto*. But in *Pierce v. Snaveling*, 1 Atky. 414, where the testator bequeathed two legacies, each of 5000*l.* stock, when he had only stock to the amount of 5000*l.* at the time of making his will or afterwards, it was held to be a general bequest, under the circumstances of the case. Where legacies are given out of bonds, securities, &c. and these fall deficient, there shall be an abatement amongst them, and it shall not affect other legatees. Pecuniary legatees must abate in proportion, but not specific legatees. 2 Equ. Ca. Abr. 557, pl. 22, cites 8 Vin. 424, pl. 39. A specific legatee, may compel a payment out of the specified article, if there be enough to pay debts. *Birch v. Baker*. Mosely, 376. Devise of a bond; the obligor afterwards became bankrupt, and the testator in his lifetime, received the dividends; this notwithstanding was held to be a specific legacy. *Sadler v. Hobbs*. 2 Bro. Cha. Rep. 108.

The general rule is established, that where a fund is pointed out by the will, the legacies must be paid out of it. Thus, where a testator gave certain legacies in stock, and others without that addition, and then gave others, and directed stock to be sold to the amount, this made all the legacies, legacies of stock. *Danvers v. Manning*. Bro. Cha. Co. 18. So where testator reciting, that he was possessed of a certain sum in navy bills, devised it; this was held to be a specific legacy, and shall pass only such navy bills, as he held at his death. *Pitt v. Camelford*. 3 Bro. Cha. Ca. 160. And where a testatrix gave nine legacies of 1000*l.* each, part of 14,500*l.* South Sea stock, it was held, that the legacies were specific. *Richardson v. Brown*. 4 Ves. jr. 177. Bequest of stock, if the testator had the stock at the time, it will be considered a specific devise. *Seldwood v. Mildmay*. 8 Ves. jr. 310. And a specific legacy of stock was decreed, according to the value at the time it ought to have been transferred. *Marley v. Bird*. *Ib.* 631.

Legacies of debts have a strong analogy to stock devised. Testatrix gave legacies to be paid within three months, out of a bond due to her; the obligor afterwards paid to the testatrix the debt, and took up the bond; the legacies are thereby adeemed. *Badrick et al. v. Stevens et al.* 3 Bro. Cha. Ca. 431. The testator gave to his sister, the interest of 300*l.* on bond, for life, and after her decease to her daughters, the interest on the bond at her death, with the principal; the legacy is specific, and there being among the bonds one of the exact amount, it was held to refer to that, though an insolvent security, and the interest in

arrear at the death of the testator. The inclination of the court is against specific legacies, but if it is clearly specific on the face of the will, it must prevail as such. *Innes v. Johnston*. 4 Ves. jr. 568, 478.

Mr. Ingersoll, for the plaintiffs. It cannot be denied, that the court are bound to carry into effect the general intent of wills. 4 Ves. 325. It is maintained here, that the general intent of the testator was, that \$8000 of 6 per cent. stock, should go to the trustees, for the benefit of Mrs. Brewster, according to their real value on the 18th September 1798, when the will was made. No particular certificates are given, and he is possessed of \$370 99 in certificates of both descriptions, more than he has bequeathed. There is no deficiency of assets out of which the legacy is payable. In none of the authorities cited, was there any intention disclosed, to guard against a diminution of the fund; nor such a residuary clause as the present, whereby according to the decisions of this court in *Clifton et al. v. Hassenclever et al.* since confirmed in the High Court of Errors and Appeals, the legacies on a deficiency of personal estate would become chargeable on the lands. I fully accede to the rule in 1 Ves. 424, that the circumstances of the case must determine whether the legacy shall be considered specific or general. The residuary clause shows that a fund was provided and reserved to meet all contingencies. It is a legacy of quantity. The pronoun "my," does not precede the bequests of the 6 per cent. stock, though it occurs as to the deferred debt. But another circumstance is relied on, and the slightest hint which the testator may have given of his intention, ought to receive due weight. "The further sum of \$600 is given in money, in aid of, and by way of addition to the income," &c. This phraseology is confined to this bequest alone; and it appearing by an accurate calculation, that \$8000, in nominal 6 per cents. was diminished on the 18th September 1798, the sum of \$533 60, the near coincidence of this amount with the \$600 given in aid of the dividends and income, is strongly indicative of the mind of the testator. It cannot be deemed an ademption, when the testator is passive merely, as to the change of the property; as where the instalments of public debt are forced on a creditor. According to the defendant's doctrine, if the testator had lived a few years longer, the dividends would have gone but a small way towards the support of Mrs. Brewster, and the maintenance and education of her children.

The court declared their opinion, that it did not appear on the face

of the will that this was a general legacy, but a specific one under all the circumstances. The \$8000 was devised in 6 per cent stock; the testator was entitled to 6 per cent stock as well as deferred debt, to the amount of the stock legacies he had devised. He distinguishes between the two kinds of stock which were of different relative values, and he gives the principal of \$8000 to the trustees, as the same shall be paid off and discharged by the United States. Specific legatees have an advantage in this, that their legacies shall not abate on a deficiency of assets; but they are subjected to other hazards, on the happening whereof they shall have contribution from the other legatees. 1 Wms. 540.

Judgment for the defendants.

EDWARD STILES *against* JOHN M. JONES and JOHN STOWERS.

The city ordinance of 29th March 1799, respecting the procuring a supply of water, is valid.

CASE stated for the opinion of the court.

It is agreed, that on the 29th March 1799, an ordinance was passed by the citizens of Philadelphia, entitled, "An ordinance for raising supplies and making appropriations for the services and exigencies of the city for the year 1799," (*prout* ordinance,) by which 12,000 dollars were appropriated for paying the interest, and towards providing a fund for the redemption of the principal, of any loan that may be raised for the more effectual supply of the city with wholesome water: 57,000 dollars were to be raised by tax.

That the city commissioners did impose and raise a tax on the estates, real and personal, and on the professions of persons within the city of Philadelphia, including the said Edward Stiles, the plaintiff.

That the said Edward Stiles having refused and neglected to pay the said tax, so as aforesaid regularly assessed upon him and his estates, on the 7th day of June 1800, a warrant issued, granted and signed by Robert Wharton, then mayor, Alexander Wilcocks, then recorder, Michael Hillegas, John Inskeep and Jonathan B. Smith, aldermen of the said city, directed to John M. Jones, one of the defendants, authorizing him to levy from the said Edward Stiles the sum of 190¹⁸/₁₀₀ dollars, the sum assessed upon the estates of the said Edward in South Marlborough and Upper Delaware wards in the said city, payable by the said Edward, according to the annexed duplicate, (*prout* warrant and duplicate.)

That the said John M. Jones did by virtue of the said warrant on the 18th June 1801, levy the said tax so as aforesaid assessed on the said Edward, on certain property belonging to the said Edward, in Dock ward, in the said city, (*prout* inventory.)

That the said property was regularly appraised and advertised. (*Prout* advertisement and appraisement.)

That the said property so levied upon and seized was sold, and the overplus, after deducting the amount of the tax and charges, was tendered to the said Edward Stiles, who refused to receive the same.

The question submitted to the consideration of the court is, whether the said ordinance is valid. If the court shall be of opinion that the said ordinance is valid, then judgment to be entered for the defendants, with costs; but if the court shall be of opinion that the said ordinance is not valid but void, and did not authorize the said proceedings, a *venire facias* to issue, to ascertain the damages of the plaintiff.

Mr. Blair for the plaintiff. By the 1st section of the 1st article of the state constitution, it is provided, that “the legislative powers of this commonwealth shall be vested in a general assembly, which shall consist of a senate and house of representatives.”

This legislative authority cannot be delegated by the general assembly to other bodies, nor was it ever intended by the framers of the constitution.

The act to incorporate the city of Philadelphia, passed on the 12th March 1789. (2 St. Laws 654.)

A supplement was passed on the 9th December 1789, (*Ib.* 764,) and a further supplement on the 2d April 1790, (*Ib.* 795,) by the 2d section whereof they are empowered to make ordinances for the levying of taxes, for the purposes of lighting, watching, watering, pitching paving and cleansing of the streets, lanes and alleys of the said city, &c.

It is obvious, that the powers intended to be granted to the corporation by the legislature, as to watering the city, must necessarily refer to the modes of obtaining a supply of water by pumps and wells, theretofore accustomed, and that the corporation were not authorized thereby to try experiments for that purpose by steam engines, at an enormous expense to the citizens.

On the 9th March 1797, the Select and Common Councils pass an ordinance prescribing the duties of the collectors of taxes, whereby they are directed, in case goods and chattels sufficient to

pay the taxes and charges cannot be found, to take the body of the delinquent and bring him before the mayor or any alderman, who shall award a warrant of commitment against him, directed to the sheriff of the city and county of Philadelphia.

The ordinance in question, enacted on the 29th March 1799, was made for raising the full and entire sum of 57,000 dollars by tax, agreeably to the last county assessment; and it is worthy of notice, that no appeal is allowed under this by-law.

On the 5th August 1799 another ordinance is enacted, whereby the further sum of 50,000 dollars is directed to be raised by the city commissioners, to be applied to the defraying the expenses of the works for watering the city, in addition to the former appropriations for that service.

It is contended, that the delegated powers to the city corporation to make by-laws binding on the people is unconstitutional. In England, every charge laid on the people, unless by act of parliament, is bad by stat. 34 Ed. 1, *de tallagio non concedendo*.

A by-law for the levying of money by way of tax, without granting appeals, is unusual in legislation and oppressive. Though it may be said, that the money to be collected under the ordinance of 27th March 1799, is to be laid agreeably to the last county assessment, concerning which an appeal was given by law, yet many cases would probably occur wherein individuals would not deem it an object to appeal against their county rates. When however large additional sums were to be raised, grounded on that assessment, they would feel it to be their duty to institute appeals.

But a fatal objection presents itself to this ordinance. Delinquents may be committed to gaol for non-payment of their taxes. A by-law on pain of imprisonment is against magna charta. 2 Co. 54. 5 Co. 64, a. Imprisonment or forfeiture of goods cannot be inflicted as penalties of by-laws. Skin. 384. They must be pecuniary and not corporal, unless there be a custom to warrant it. 1 Salk. 349. 12 Mod. 686. It has ever been held, that a by-law to levy fines by distress and sale of goods is bad. 3 Lev. 281. S. C. 2 Vent. 183. And a by-law being entire, if it be unreasonable in any particular, it shall be void in the whole. 1 Com. Dig. 615. If a grievance may possibly happen under it, the law is nullified thereby. Comb. 378. A by-law is like a custom, which being entire also, if void in part is bad for the whole. Hob. 189. If an ordinance be unreasonable, it will be condemned. Hutt. 6. The power of making by-laws is to be taken strictly, and shall not be carried beyond the intention of the charter. 2 Wms. 209.

Mr. Ingersoll for the defendants. The first objection made against the ordinance goes to a total denial of all the powers of the corporation to make by-laws. The first article of the constitution refers to the legislative authority of the general assembly to enact laws binding on the whole state, not to those binding on a city or borough, in subordination to and not inconsistent with the general system. But this point having been already solemnly determined on the ordinance respecting wooden buildings within the city, I consider that question fully at rest.

The powers of the city corporation are derived from the legislative acts of the government. The act of incorporation of 1789 in § 16, gives them full power and authority to make such ordinances as shall be necessary or convenient for the government and welfare of the city: and by § 44 directs, that all doubts in courts and elsewhere shall be taken most favorably for the corporation.

The second supplementary act of 1790, in the preamble and § 2, likewise fully authorizes them to assess and levy taxes for lighting, watching, watering, pitching, paving and cleansing the streets of the city.

The corporation are not restricted as to the sums which they may thus raise. The dispute is only about the application of the money. But it is evident, they must judge what the peculiar interests and convenience of the city may demand. It is for this precise purpose that corporate bodies are instituted.

It will not be denied, that the purity and wholesomeness of water, is necessary and convenient to the citizens, from a variety of considerations. Good water conduces greatly to their health, and we have experienced in the late fires, the great utility of the hydrants. Great powers are included under the expressions of watering the city; and it is wholly left to the corporation to fix on the mode of obtaining water. They are not confined to pumps and wells. Improvements daily arise, which may be applied with great utility in large cities. No restrictions either express or implied, exist, either as to quantity, mode or expense, in the supply of water. The preamble of the law of 1790 is very full, as to their discretionary powers for the advancement of the public health; and every citizen must bear his proportion of the public burthens.

Under the 3d section of the act of 17th April 1795, 3 St. Laws 746, the county taxes are to be paid by the owners of property, and the 6th section secures to every person the benefit of an appeal.

But it has been objected, that as imprisonment for non-pay-

ment of taxes may be the consequence of this ordinance, it is therefore bad. This will admit of two satisfactory answers.

Under the act of 18th February 1769, St. Laws 508, commissioners were appointed for paving and cleansing the streets, who might lay taxes for that purpose, and by § 15 the collectors, in case effects could not be found sufficient to answer the arrears of taxes and charges, were empowered to imprison the party delinquent, under a special warrant of four or more of the said commissioners. By a subsequent act of the 14th March 1777, the powers of the city corporation under the above law of 1769, were transferred to the justices of the peace, the corporation being dissolved in consequence of the revolution; but by § 35 and 36 of the act of incorporation, all the duties and powers of the city wardens and street commissioners were transferred to the corporation. 2 St. Laws 667. And this appears most fully by the supplementary act of 2d April 1790, § 1, 2 St. Laws 795. It is admitted then, that the general rule as to by-laws is, that their penalties must be levied by distress and sale of goods, or recovered in actions of debt; but according to 1 Salk. 349, and 12 Mod. 686, the penalties may by custom be corporal. Legislative acts are certainly equal in their operation to any custom, and so were resolved to be, in the former case cited, concerning the wooden buildings.

But moreover, notwithstanding the assertion in 1 Com. Dig. 615, a by-law may be good in part and void for the rest. 1 Stra. 469. Say. 256. Kyd's Law of Corpora. 155. The objection has been made to the ordinance of 29th March 1799, but if well founded, it is only referable to that of 9th March 1797. And the powers thereby given to the collectors to seize and sell, may be good, though their right to imprison was even questionable.

The court were unanimously of opinion, that the ordinance of 29th March 1799, was a valid one.

Judgment for the defendants.

WILLIAM M'FADEN *against* WILLIAM PARKER and MOORE WHARTON.

New trial granted where in a suit on a note by indorsee against indorsers the court submitted to the jury the intentions of the plaintiff in discharging the drawer out of custody on a *ca. sa.* issued against him.

ACTION by indorsee, against the indorsers of a promissory note. The case was this.

On the 30th December 1796, George Eddy drew a promissory note for \$1200, payable to Parker and Wharton, or their order, in 60 days, who indorsed the same to M'Faden. The note not being paid when it became due, the present suit was brought by the plaintiff, and also another against the drawer, to March term 1797, on which judgment was obtained according to the practice of the court in September term following. The present cause was put to issue in September term 1797, by the defendants' pleading *non assumpserunt* and payment, and after one term had intervened, was marked not to be brought forward.

A *testatum ca. sa.* issued on the judgment against the drawer of Northampton county, returnable to December term 1797, on which the sheriff returned "c. c. c. and the defendant discharged from the execution by order of the plaintiff." The following note was written by the plaintiff to the sheriff:

"M'Faden v. Eddy. Sir. I request and desire that you discharge the defendant on the above mentioned writ, he having satisfied me of the debt, interest and costs. November 20th, 1797.

WM. M'FADEN.

"To Henry Spering, sheriff of Northampton county."

Underneath was entered, "Plaintiff paid sheriff 45 dollars, the costs."

On the same 20th November, Eddy gave his judgment bond to the plaintiff for the amount of the debt, interest and costs, payable in four months; on which judgment was entered the following day in the county of Northampton; but from the embarrassed state of Eddy's affairs there was no prospect of obtaining the money under the judgment.

The cause came before the court at different times, under various shapes.

On the 26th December 1801, a jury was sworn in it, when the contest was, whether as the receipt of the 20th November 1797, preceded December term, and it was not then pleaded *puis darrein continuance*, the same would be received in evidence. On the part of the plaintiff it was contended, that as the defence was grounded on strict law, the acceptance of an useless unproductive bond from the drawer, the same measure should be dealt out to his adversary; and if he had foregone

his legal right by omitting to plead the same in due time, the court would not interpose in his behalf. The defendants insisted, that whatever took away the right of action, though after plea pleaded, might be given in evidence on the general issue, if the party was not bound to plead it specially. Here the receipt not being under seal, could not be specially pleaded; and any thing might be given in evidence, which showed that the plaintiff had no cause of action. 3 Burr. 1345. The uniform sentiments of the court and bar, and the liberality of practice, which had constantly prevailed in Pennsylvania, operated strongly on the resolutions in the English books; and it was presumed that none of the profession meant to introduce a new mode of practice.

The plaintiff's counsel frankly disclaimed any such intention; and it was then agreed, that a verdict should be given for the plaintiff for \$1564 $\frac{1}{2}$ 0, subject to the opinion of the court on this question, whether the discharge and receipt (before stated,) given by the plaintiff to George Eddy, could be given in evidence under the pleadings and issue in this case? It was admitted, that the defendants' counsel, as soon as he knew of the discharge of the drawer from execution, communicated it to the plaintiff's counsel, who once marked the cause, or ordered it to be marked, not to be brought forward; but whether this communication was before or after December term 1797, the defendants' counsel does not recollect; but the plaintiff's counsel affirms positively, that it was after December term 1797, and he revoked the order not to be brought forward, soon after it was made, and ordered the cause to be marked for trial. It was also admitted, that the plaintiff received no money upon giving the discharge and receipt as above stated to George Eddy, but took a bond and warrant of attorney from him, upon which judgment was entered up in Northampton county, and binds the lands which George Eddy has there, if any he has. And if the court shall be of opinion, that the discharge could not be given in evidence, it was agreed, that judgment should be entered for the plaintiff; but if otherwise, then the verdict to be taken off, and judgment entered for the defendants.

On the 28th December 1802, the question came on to be argued before the court, and after some progress made therein, it was insinuated, that if the plaintiff recovered, it must be owing to the default of the adverse counsel, which had arisen from the acts of the plaintiff's counsel, whereupon the plaintiff's counsel readily agreed to postpone the argument, and to try the cause again on the following terms:

It was agreed, that the defendants should be permitted to enter at

this time, a plea *puis darrein continuance*, with like effect as if it had been entered at the day given for their next appearance after the new matter occurred. It was further agreed, that the plaintiff should be allowed to give evidence of all facts and circumstances, to show that the new matter pleaded, ought not to operate as a discharge of the defendants; and that the defendants be allowed to give evidence of all facts and circumstances to repel such evidence on the part of the plaintiff, and to show that such matter ought to operate as a discharge of the defendants, and that the plaintiff has received actual value or security from the drawer. And that it be admitted, that notice in due form of law was given to the defendants by the plaintiff, of the non-payment of the note on which the suit is founded.

Under this agreement, the defendants on the 26th February 1803, entered the plea of payment *puis darrein continuance*, with leave to give the special matters in evidence, and relinquished all former pleas. The plaintiff replied *non solverunt* and issue.

On the 8d March 1803, at Nisi Prius before Shippen, C. J. Smith and Brackenridge, Justices, the cause came on again for a trial, when after a full discussion of the questions of law on both sides, the Chief Justice charged the jury to the following effect:

The indorser of a promissory note is equally liable with the drawer, and he is fixed after due notice, unless an actual satisfaction has been received. Whether there has been such satisfaction is the point to be tried.

The taking of the drawer in execution and discharging him by the indorsee, will in general exonerate the indorsers of a note, but not the mere acceptance of a bond from him. Here the defendants rely on the words of the discharge. The expressions are strong, and taken by themselves, independent of the other proof, would indicate that the debts, interest and costs were fully paid. The drawer might have convinced the indorsee, that he was perfectly safe, in relying upon him alone. If his goods or lands had been levied on to the amount of the debt, the indorsers would have been discharged clearly. So if the indorsee had done any act, whereby the indorsers would be led to believe naturally, that they were discharged, and had thereby been lulled into a fancied security. The true question rests on the party's intentions at the time. It is possible, that the plaintiff might have depended more on the solvency of Eddy, than of the defendants; but if the latter had not seen his discharge, they might possibly have taken effectual measures against the drawer. It is however contended here, that the indorsee only intended to discharge the drawer and not the indorsers.

This is a matter of fact to be decided by the jury, whether the plaintiff relied solely on the bond and judgment of Eddy. If they should be of opinion, that the discharge was confined to Eddy, then the plaintiff is entitled to recover; otherwise not. For the bond may be a satisfaction, if it was so intended, though no money was paid to the plaintiff.

The jury found a verdict for the plaintiff for \$1651.

And now 22d March 1803, a new trial was moved for by the defendants' counsel, on the ground of the court's misdirection to the jury. They should have been told the operation of the law under all the facts and circumstances combined. The intention of the indorsee, to discharge either drawer or indorsers, should not have been submitted to them to decide on.

Next to doing right, the great object in the administration of public justice, should be to give public satisfaction. 3 Bl. Com. 390. 2 Term Rep. 120. It is confidently believed, should the court be convinced on more minute reflection that they have erred, they will say so without hesitation.

The agreement under which the cause was tried, has been relied on by our adversaries. But it cannot be inferred from thence, that the intention of the parties was to be left to the jury, or that the rules of evidence were to be relaxed in the smallest particular. Neither side is precluded thereby from taking a bill of exceptions, or moving for a new trial. Let the intentions of the plaintiff be what they might, we are now concluded by the verdict on that head. But we are at liberty to contend, that his intentions cannot operate on the present question; and if the drawer of the note was discharged by the act of the indorsee, under all the circumstances of the case, that it will avail the indorsers. They guaranteed payment *sub modo*; but if the holder destroyed or even delayed their remedy against the drawer, they are discharged. They could not be supposed to surrender their legal rights by the agreement.

Where the defendant was taken on a ca. sa. and discharged by the plaintiff's consent, he is not liable to any new execution, nor to an action on the judgment. 4 Burr. 2482. If the plaintiff consent to discharge one of several defendants taken on a joint ca. sa. he cannot afterwards retake him, or any of the others. 6 T. R. 525. Where a party is taken on a ca. sa. it is the same thing as if he had paid the money. 3 Wils. 14. It is a satisfaction in law. Ambl. 79. 7 T. R. 421. Here it is admitted, that Eddy was discharged; but it is objected, that this does not discharge the defendants. We agree, that merely taking him in execution does not discharge them, and that while the plaintiff remained passive, it was no payment, either as to him or third

persons. But an executor discharging one in execution, shall be accounted in law assets, as money received. Hob. 59.

Acceptance of a less sum in satisfaction is a discharge of the previous debt. 1 Stra. 691. So of a bond. Noy. 140. And where an indorsee accepts of a bond from the drawer of a bill of exchange, it will be a bar to any action which may be brought against the indorsers. 8 Mod. 87. It is not insinuated, that the bond taken will extinguish the judgment in this court against the drawer, but that his release from the custody of the sheriff and the terms of plaintiff's note to the sheriff, operate as a complete satisfaction; and the cases show, what cannot be denied, that the acts of the holder may exonerate the indorser. 1 Dall. 254-5. Though nothing but an express declaration by the holder of a bill will discharge the acceptor, it is otherwise as to the indorsers. Doug. 249. (2d edit.) And it will be observed, that in *Ellis v. Gallindo*, *Id.* 250, the question of intention arising out of the circumstances, which the court on the motion for a new trial thought should have been left to the jury, was in the case of an acceptor and not of an indorser.

The indorsee of a promissory note, seeing the hand-writing of the indorser, need not examine that of the drawer. He sometimes looks to the credit of each. All are presumed to know the law and to trust to it. The indorser is not even a surety until fixed by notice, and then is a mere favoured surety. He is bound contingently, but a surety is bound in the first stage of the transaction. Where an obligee in a bond with a surety, without communication with the surety, took notes from the principal, and gave futher time, the surety was discharged. 2 Ves. jr. 540. 2 Bro. Cha. Ca. 579. Upon a joint and several bond, each obligor is a principal at law; but equity makes a wide difference, as justice requires, between principals and sureties. Where any act has been done by the obligee, that may injure the surety, the court is very glad to lay hold of it, in favor of the surety. 4 Ves. jr. 833. The indorser of a bill is fixed by notice, and Lord Chief Justice Eyre argues on it. Giving a new credit to the acceptor before noting and protesting for non-payment, will discharge the acceptor. 1 Bos. and Pull. 655. The holder is not bound to sue the acceptor after protest for non-payment and notice to the drawer, and may forbear to sue him, after his right to sue the drawer has attached. *Ibid.* So here. The plaintiff was under no necessity of suing Eddy, but might have sued the defendants alone. He has, however, proceeded to judgment and execution against the former, and has discharged the latter by entering into a new engagement with him, and giving him a new credit of four months, without their

consent or participation. Doing of this after judgment can make no difference. The judgment was annihilated by taking Eddy's body in execution and his subsequent enlargement.

The authority of *Hayling v. Mullhall*, 2 Bl. Rep 1285, was much relied on at the trial by the plaintiff's counsel. It is there held, (vide 2 Bos. and Pull. 62,) that a bill holder may sue a subsequent indorser, notwithstanding he has ineffectually taken in execution the body of a prior indorser and afterwards set him at liberty on a letter of license; and according to Blackstone, J. taking the body in execution by a *ca. sa.* only operates as a discharge to the identical person so imprisoned. Lord Mansfield, speaking of these reports, says they are not very accurate. We must not always rely on the words of reports, though under great names. Doug. 98. (2d edit. note.) Besides, the principles of the case are contradicted in 2 Ves. jr. 540. There the party was discharged on a letter of license, so that the debt continued. Here the plaintiff acknowledged that he was satisfied the debt, interest and costs, and the judgment was thereby extinguished. We are not left at liberty to consider whether the thing given and received in satisfaction, turned not to be so good as it as then culculated upon by both parties.

Since the trial we have been fortunate enough to discover two cases, the principles whereof apply directly to the questions before the court. The first is *ex parte* Smith, in the matter of Lewis and Potter, 3 Bro. Cha. Ca. 1. There the indorser of a bill of exchange became bankrupt, and the holder proved the amount of his bill under his commission, and afterwards compounded it and discharged the acceptor without notice to the assignees of the indorser; and he was held thereby to discharge also the indorser's estate, and the proof of his debt was expunged. Lord Chancellor Thurlow says, that the doctrine of notice, which holds among solvent persons, does not apply as between bankrupt estates, and argues on the ground of the indorser being fixed. If notice was necessary, and not given, the indorser would certainly be discharged. He was well satisfied that the creditor had made the best terms he could with the drawer of the note, and that the justice of the particular case was with him; but he thought in point of precedent it might be dangerous to say, that after such an acquittal, the holder may resort to the indorser's estate. Though the holder did the best he could against the drawer, this shall not avail him as against the indorser. He shall not favour the former at the expense of the latter.

The next case in *English v. Darley*. 2 Bos. and Pull. 61. There the indorsee of a bill prosecuted the acceptor to judgment and execution, and having received part to his bond for the remainder, except-

ing only a nominal sum, payable by instalments, and he was held to be precluded from proceeding against the indorser. The plaintiff's counsel insisted that each of the parties to the bill were as co-sureties, and that nothing short of actual payment by one of them should be considered as a satisfaction in an action against any of the others, and relied on the cases in 2 Bl. Rep. 1235 and 4 Term Rep. 825, cited on the present trial. But Lord Chief Justice Eldon delivered the opinion of the court, that as long as the holder is passive, all his remedies remain; and if any of the parties be discharged by the act of law, that operation of law shall not prejudice the holder. If he sues a prior indorser first and discharges him from execution, it will afford a sufficient objection to an action against a subsequent indorser, and the liability of the indorser is varied by the act of the holder.

It is apprehended that these resolutions meet precisely the case before the court. The maxim, *sic utere suo, ut alienum non laedas* is strictly applicable to the legal question. But the plaintiff's doctrine prostrates the remedy of an indorser against the drawer of a note and prior indorsers. The court are called on to settle a great mercantile point. It is presumed this will not be done upon what is called justice in the abstract, but that the court will pursue that equity which is interwoven with our system of judicial polity, and depends on principle as well as precedent.

The arguments of the plaintiff's counsel were in substance as follow:

It has been said with much reason, that we rely on the true spirit of the agreement of counsel, under which this suit was tried. The circumstances which gave rise to it must not be forgotten. It cannot have escaped the recollection of the court, that in the two first instances, wherein the parties presented themselves before them, the plaintiff's counsel insisted, that the discharge on the *ca. sa.* and their client's directions to the sheriff of Northampton county, could not be received in evidence, not having been pleaded since the last continuance. When by our agreement of the 28th December 1802, we disarmed ourselves of our matter of law, we naturally must have expected reciprocity. Our object was to guard against the conclusiveness of the written papers, and yet our adversaries now insist on it. What do we get in return for our concession, unless the intention of the plaintiff was fairly to be submitted to the jury? On this ground the trial proceeded, and the counsel on each side cited *Dingwall v. Dun-*

ster, Doug. 247, 2d ed., and *Ellis v. Gallindo*, *ib.* 250 (note) and applied them as it best suited their purposes. We contended, that it was a question of intention arising out of the circumstances, and that what was done against the drawer did not necessarily discharge the indorsers. The Chief Justice expressed the same ideas of the agreement in his charge to the jury.

The law of merchants is founded on plain sound reason, disentangled from legal jargon. It is a general rule, that all the parties to a note or bill are liable to the holder till actual payment, but like other general rules it is subject to exceptions. It lies on the defendants to repel the demand of the plaintiff.

We conceded on the trial, that if the plaintiff had been guilty of any laches before notice, or had given further time to the drawer, the indorsers would be discharged; that the discharge of one of two more joint debtors is a discharge of all; and that a discharge on a *ca. sa.* by a plaintiff puts an end to all remedy against the person of the same defendant. On joint and several obligations, if there is a joint suit, the plaintiff cannot have several executions; but it is otherwise if they are sued severally. Hob. 59, 60, 61.

When this note became due, the indorsers became absolutely responsible for the money of receiving notice that the drawer had not paid it. They then ceased to be conditional sureties, and were bound to take it up. When it was indorsed it resembled a bill of exchange, the drawer representing the acceptor in the latter case. Kyd. on Bills 22. And nothing will discharge the indorser but the absolute payment of the money. *Ib.* 72. The indorsee does not trust to the credit of the drawer of a bill. *Ib.* 110. The plaintiff therefore having confided in the solvency of the defendants, when he paid his money, may well look to them, if even the hand-writing of the drawer was forged. Here the notice of non-payments of the note is admitted to have been duly given to the defendants. If the indorsee gives credit to the drawer without notice to the indorser, it will discharge him. Bull. 275. But though forbearance before protest and notice is a discharge yet after such notice no laches can be imputed to the drawer. 1 Bos. and Pull. 655, already cited. Notwithstanding what the Chief Justice is made to say, in 3 Mod. 87, respecting the indorsee of a bill of exchange excepting a bond from the drawer, and thereby barring his remedy against the indorsers, it appears by a report of the same case, in 2 Show. 494, 503, that the Chief Justice was absent. At the most, if the opinion was delivered, it was extra-judicial, and little weight can be attached to it. 1 Burr. 8. 8 Burr. 1730. 4 Burr. 2068.

The indorser of a note is not discharged without actual payment, until there is some neglect or default in the indorsee. 1 Wils. 47. The plaintiff has been guilty of neither. If he had not proceeded to execution against the drawer, he would have been censured for endeavouring to throw the whole burthen on the indorsers. And now our best efforts in their favour are made a ground of defence. In taking the bond the plaintiff must be considered as agent, for those liable to pay.

The case in 3 Wils. 13, 14, is well explained in, Tidd. 768, Lond. ed., 412, Dublin ed.; a *ca. sa.* is *quoad* the defendant considered in law a satisfaction of the debt, but is no satisfaction, so as to bar the plaintiff from taking out execution against other persons, liable to the same debt or damages. Hob. 59. It will not be pretended, that the bond or the judgment entered under it, could be pleaded in bar of the former judgment. 1 Dall. 423.

In the late discovered authorities, the case *ex parte* Smith depended on the indorsees accepting the proposition of the drawer of the note to pay 15s. in the pound to all his creditors, receiving the same, and giving a full discharge to the drawer for the amount of his note, without the consent or privity of the assignees of the indorsers who were bankrupts. The Lord Chancellor thought that such a proceeding would be open to fraud, by favouring an acceptor at the expense of an indorser by an improper composition. And in *English v. Darley*, the indorsee of the bill after proceeding to execution against the acceptor, though he had sufficient to answer the same, received a part of his demand and took security for the remainder, which was an act highly injurious to the indorser. Those authorities therefore are clearly distinguishable from the case now under consideration. It is true, in the latter case. Lord Eldon censures the marginal abstract of *Hayling v. Mulhall*, in 2 Bl. Rep. 1235, as incorrect, but finds no fault with the report itself. It therefore stands uncontradicted, notwithstanding the suggestions of the defendant's counsel, and moreover has been transcribed and adopted by Kyd, Baley, Lovelass, and the editors of the Supplement to Bacon's Abridgment. In 4 Term Rep. 825, Ld. Kenyon says, that taking the body of an acceptor of a bill in execution, is no satisfaction of the debt as between others, than the holder; and that it was a mere, formal satisfaction even to the holder, not like actual payment.

The equity of this case has been fully accomplished by the verdict; the defendants have received the plaintiff's money, and were bound to pay the note on receiving notice of the drawer's default. The court will not grant a new trial on the ground of

misdirection in point of law, if they see that justice has been done between the parties. 2 Term Rep. 4. Every thing will be presumed in favor of the verdict, and if it be consistent with the justice, conscience and equity of the case, they will not set it aside. 4 Term Rep. 648.

Shippen, C. J. delivered the opinion of the court, The argument has been conducted with great ability, and the matters of law have been much better considered than at the trial. We deem it no dishonor to say, that independent of the argument, we now think, that the intentions of the plaintiff should not have been submitted to the jury, whether at the time of the discharge of Eddy he relied on the defendants. We are not however satisfied about the true construction of the argument; and as it has made different impressions on the minds of honorable counsel, we decline giving any opinion on it for the present, and think the same should be more fully considered. In the mean-while, we award a new trial without costs.

Messrs. Ingersoll and Dallas, *pro quer.*

Messrs. E. Tilghman and Hallowel, *pro def.*

AT A CIRCUIT COURT, AT LANCASTER, APRIL 1803.

CORAM, YEATES AND SMITH, JUSTICES.

JACOB FOX *against* EVAN EVANS.

Issue to try the validity of a will. Two out of three subscribing witnesses prove it, and no evidence is given of the hand-writing of the third who is absent out of the state. The declarations of such third person that the testatrix was insane shall not be received.

THIS was a feigned issue from the register's court, to try the validity of the last will of Mary Evans.

The will was subscribed by three witnesses, and two of them duly proved its execution, and the sanity of the testatrix. The third witness, Willian Spence, had left the state and removed to Virginia.

Mr. Hopkins for the defendant, offered a witness, to prove the declarations of this Spence, that the testatrix was absolutely childish when she made her will, her mental faculties being quite destroyed by old age. His signature adds validity to the instrument, and therefore what he has been heard to say shall be received in evidence to counter-act his subscription.

Mr. Montgomery for the plaintiff, remarked, that wills had been established, though the subscribing witnesses had sworn to the insanity of the testator, and instanced *Lowe v. Jolliffe*. 1 Bl. Rep. 365. And Mr. Justice Yeates has observed, that a witness ought not to be admitted to give evidence against his own attestation of a will. 4 Burr. 2225.

By the court. The evidence might be offered with a much better prospect of success, if this was a bill brought to establish a will of lands in England, where three witnesses are necessary by the statute of frauds and perjuries. There the rule is, that all the witnesses, if living, must be examined. 1 Vez. 177. 1 Wils. 216. Where one of the witnesses has gone beyond sea, a commission issues to examine him, and the same credit is not given to his hand-writing as if dead. 3 Vez. 460. Where the witnesses are dead, their hands may be proved. Bull. 265. In one case indeed, *Clymer's lessee v. Littler et al.* hear say evidence was received, that William Medlicott acknowledged he had forged the will in question. But that rested on the peculiar circumstances of the case, and the court said no general rule could be drawn from it. 1 Bl. Rep. 349. Medlicott being dead at the

trial, his hand-writing to the will or instrument of 1745 was proved, which contained a disposition of the premises to his wife in fee. 3 Burr. 1247. If he had been living, he must have been called to prove the instrument, and the hearsay testimony went not to give evidence of the forgery, but to impeach the credit of Medlicott, in the same manner as if he had been alive and examined ; and besides, it came out on the cross examination of the adverse party. *Ib.* 1255.

But in the present instance no testimony has been offered respecting the hand writing of Spence. Nor did the same become necessary by our laws, which provide that a will respecting lands may be proved by two witnesses. In deed personalty alone is disposed of by this will. The will in question therefore derives no validity from the subscription of Spence ; and if he has made any declarations concerning the state of mind of the testatrix, they cannot be admitted according to our united opinions. However we will agree to receive the evidence, subject to the terms of a new trial being awarded, in case of a verdict being found for the defendant, without costs, provided we shall adhere to our present opinion, with the benefit of appeal to either party in bank.

The defendant's counsel then waived the testimony, and the jury after a full hearing established the will.

CHRISTIANA EVANS *against* JOSHUA EVANS, jun.

Feme living separate from baron, executes a release to him of her right of dower in consideration of a certain sum being secured to her annually for life, and after his death for eight years receives the same, the jury may presume from these circumstances a re-delivery of the deed by her.

DOWER of 180 acres of land in Salisbury township.

The tenant pleaded three pleas. 1st. A release. 2d. A jointure during coverture, accepted and agreed to after her husband's death. 3d. An agreement between the demandant and Amos Evans, her late husband, to live separate and apart from him, on a separate maintenance of 15*l.* per annum, settled on and secured to her, by him. The demandant in her replication negatived these pleas, adding coverture to each ; on which issues were joined.

It appeared in evidence, that for some years before the death of the demandant's husband, which took place in January 1796, much family uneasiness subsisted between them, on account of an unfortunate connection he had formed with another woman, by whom he had children. That this ended in a separation, and on his sale of another tract of land, she joined with him in a conveyance to the purchasers, who gave a bond

to her two brothers on the 1st June 1792, in the penalty of 200*l.*, to secure to them, the annual payment of 15*l.* during her life, for her use; and that she on the same day, by an instrument reciting the provision which had been made for her, released to her husband and his heirs, all her right and title of dower, which was duly acknowledged before her brother, a justice of the peace, who transacted her business for her. The lands in question were of little value, and would not rent for more than 5*l.* per year. The annual provision of 15*l.* had been regularly paid to the demandant during her husband's life, and she had received it for eight years after his death, up to the present month of April 1803.

The counsel on each side submitted the cause to the direction of the court; who were clearly of opinion that the release extended to all the lands, by the express terms thereof. The instrument during marriage would not be good at law, which considers baron and feme as one person, with the same interests. But the circumstances of the demandant's frequent acts in receiving her annual provision of 15*l.* formed a mass of evidence, after the death of her husband, from which the jury might presume a re-delivery of the release, which would be binding on her. Cowp. 201. Loft. 763. Doug. 53, note 7. Indeed it was of moment that it should be so considered, so far as respected the interest of the widow. For if the release was declared to be invalid, the consideration of the bond would fail, and she might be reduced to take her one third part of 5*l.* the rent of the lands in question, and forfeit her right to the 15*l.* per annum.

The jury readily found a verdict for the tenant.

Mr. Montgomery for the demandant.

Mr. Hopkins for the tenant.

JOHN HERSH *against* JACOB RINGWALT.

In slander, it is sufficient if the substantial slanderous words are laid and proved. If one assert a slander generally, without adding who told it to him, it is actionable; and even then, it must be such a report, as will induce a reasonable belief. If no special damage is laid, proof of particular damages will not be received.

SLANDER. Words of homicide, and that the plaintiff was in York gaol on that account. Plea *non cul.* with liberty to give the special matters in evidence.

It appeared, that a very injurious report, without the smallest ground of suspicion, had been circulated respecting the plaintiff,

who possessed an irreproachable character. Five or six persons had spoken of it, before the defendant uttered the supposed slanderous words. The defendant afterwards mentioned the matter at a public inn, and said he heard it from two persons, whose names he mentioned. He produced one of them at the trial, verified his assertion. There was no ill will between the parties. He appeared concerned on hearing the news, and was not desirous of spreading it.

The defendant's counsel objected, that all the words spoken by the defendant had not been laid in the declaration. They contended that if one related particulars of another, which were slanderous in themselves, and mentioned at the time that he had it from the relation of a person, whom he named, and such person in fact did tell him so, the same might be pleaded in bar of the action, according to the authority of *Davis v. Lewis* in 7 Term Rep. 17.

The plaintiff's counsel answered, that it is not lawful to mention that he heard I. S. say such words. 12 Co. 133-4. And in *Gardiner v. Atwater*, it was held to be quite immaterial, whether F. P. did or did not tell the defendant so. Say. 265. 4 Bac. Ab. 510. So Lord Chief Justice Lee held, that proof of the defendant's having heard a story read out of a letter, that the master of a ship had been seized and he put in prison for running corn, and that he only reported the story; was no justification; but that every person was answerable for the slander he reported of another. Bull, 10. The mischiefs to society are incalculable, if such odious habits should be sanctioned by courts of justice. A person of the best fame, whose character has been basely traduced by a hidden assassin, vainly seeks for redress for the grossest injury. He perhaps may never discover the first author of the slander. The statute of limitations may stop him in his puitsuit; or if he is so fortunate as to reach the source of the cruel, unprovoked mischief, it may terminate in a most insignificant reptile, of the vilest character, without property, from the prosecution of whom, nothing but additional disgrace could result.

As to the words laid, it is necessary only to prove the substance of them. Bull. 5.

By the court. It is sufficient, if the substantial slanderous words are laid and proved. Otherwise the consequence necessarily would be, that if a conversation, wherein slander was uttered, continued for an hour, the whole must be distinctly expressed in the declaration and proved in evidence, which would be idle and superfluous.

The case of *Davis v. Lewis* is sound law, founded on the common usage of mankind, and adapted to the common concerns of life. Vid. 1 Rol. Abr. 64, pl. 20. 1 Com. Dig. 202. 4 Bac. Abr. 509. 1 Rol. Rep. 69. 1 Lev. 82. Cro. Jac. 91. 2 East 436. If one assert a slander generally, without adding who told it to him, it is actionable. But if he would shelter himself under the cover of report, it must be such a one as would induce reasonable belief. If it should appear to be the mere vehicle of malice, or the party should attempt to vindicate himself under an author wholly of credit, we should deem it aggravation of the injury, by a substitution of finesse in *fraudem legis*. In the present instance, the defendant said he heard the report from two persons he named, but he has shown but one of them, and therefore he is not within the true spirit of the case cited in his defence. Yet the case is not of an aggravated kind: there was no ill blood between the parties, and he was not industrious in circulating the report.

In the course of the trial, a witness was offered to prove that a traveler refused to go to the plaintiff's inn on the ground of the report, and mentioned so at the time. But the court rejected the testimony. This is *res inter alios acta*, and no special damage is laid in the declaration.

The jury gave a verdict for the defendant.

Messrs. Hopkins and Bowie, *pro quer.*

Messrs. O. Smith and Montgomery, *pro def.*

AT A CIRCUIT COURT, AT NEW YORK APRIL, 1803.

CORAM, YEATES AND SMITH JUSTICES.

ELIZABETH EYSTER and ABRAHAM KAGEY *against* JOHN YOUNG.

Though a will of land must be proved regularly by two witnesses, yet circumstances may supply the want of one witness, where they go directly to the immediate act of disposition.

FRIGNED issue to try the validity of the last will of Daniel Eyster. The facts were as follow :

The deceased being much indisposed, sent for Joseph Rudisill, esq. one of the judges of the Court of Common Pleas of York county, to draw his will. He received his instructions at his bed side, in the presence of Jacob Kagey and Dr. Christian Messing; and he swore, made short memorandums of them in writing, which he read and explained to him, and asked him if he was satisfied therewith as his will; to which he replied in the affirmative. The decedent was in his perfect senses, though in pain, which however was not continual; he was at no loss with respect to his directions, and seemed to have thought of his will before, which was remarked at the time, Rudisill went into another room with Kagey, where a formal will was drawn up and given to Kagey to persue. Eyster getting worse, the will was finished in haste, and was read to him till within three lines of the bottom of the first page, with which he declared his satisfaction. The reading was then continued till the scrivener came to the middle part of the second page, when he observed his eyes to stare, in a fixed position, and thought his last moments approaching. He died within an hour afterwards. The rough memorandums were sworn to be in the same state, as when received and entered from the mouth of Eyster.

The disposition of Jacob Kagey was taken before the register on the caveat, though but imperfectly, and confirmed the substantial parts of Rudisill's testimony, but he was not so minute. He was since dead. He heard some of the directions given by the decedent though not all, as he spoke in a low voice. They were written down in his presence, and were all read and explained to Eyster; the greater part at least, were explained to him, when he was in his senses. After the will was reduced into form, a part of the first page, was read to him, to which he gave his assent, and his understanding left him.

He was asked no questions, as to the idemifying the minutes, though they were filed in the office.

Christian Messing attended the decedent in a medical character, and was in the room all the time, as he thought, when he gave the directions, which were committed to writing, and read to him afterwards. He said they were all right. After the will had been prepared, it was read partly to him and he agreed to it. He then got worse and spoke no more. The witness believed, that the memorandums produced were those taken at the time from the instructions of Eyster.

These notes differed in some degree from the formal instrument. The latter was more copious and full than the former, and continued some clauses which Mr. Rudisill had trusted to his memory.

Three issues were joined :

1st. Whether the original notes were the last will of the decedent ?

2d. Whether the formal instrument was his will ?

3d. Whether both papers taken together were his will.

The defendant's counsel insisted on four objections :

1st. That the instructions were no will, because ambulatory.

2d. They were not sufficiently explicit, as to all the property.

2d. Publication was wanting to them.

4th. They were proved by one witness only.

1. The *animus testandi* must be collected from the instrument, otherwise the law will not consider it as a will. 1 Flonbla. 159. These minutes were a mere draught to govern the scrivener, in drawing his true will, and were not intended to operate as his testament. They were subject to alteration. A writing prepared for a draught of the testator's will only, or for a more ready direction of the testator whereby to make his testament afterwards, is not to be accounted a testament. Swinb. 521. part 7, sect. 13.

2. The minutes do not comprehend all the estate. They are but imperfect notes. Swinb. 522.

3. Publication is in the eye of the law, an essential part of the execution of a will, and not a mere matter of form. Pow. Dev. 81. 8 Vin. Ab. 119, pl. 16.

4. In the language of the late C. J. it would be dangerous indeed, were the idea tolerated for a moment, that any individual could alone prove the validity of the will, which he had written. 1 Dall. 288, Lewis v. Maris. By that case, it is fully settled, that the true meaning of the act of assembly of 1705 is, that the will shall be proved by two or more credible witnesses, and nothing short of it will do. It never could be designed, that greater solemnity should be observed in a

verbal testatement, or n repealing that in making a last will and testament; and the law of 1705 requires the testimony of two or more witnesses to the probate of a nuncupative will, and also to the revocation of a will *Ib.* 1 Ves. jr. 13.

It is acknowledged that Mr. Rudisill is a complete witness to prove the original notes, and is superior to all exception. But where is the second witness? Kagey does not identify the memorandums, nor assert that all the clauses of the will were explained to the decedent. Messing barely believes he was in the chamber all the time of taking the memorandums, but his professional character must have led his mind to other subjects than making the will, if his belief on the other head is correct. He barely gives his belief as to the identity of the memorandums. The formal instrument cannot possibly be established. It varies in two material instances from the instructions, and therefore cannot stand. Besides it is not proved by two witnesses with any degree of precision, how much of the first page was read to Eyster. The rules of propriety must be fixed on a solid certain basis. They also cited Pow. Dev. 30.

The plaintiff's counsel answered, that devises of land pursuant to the statutes of 32d and 34th Hen. 8, had been frequently established in Pennsylvania, though the settled rule is, that they must be proved by witnesses, or an equivalent. If the intent of the donor be to make a will, the instrument will operate as such, though it be delivered as a deed. Pow. on Dev. 14. Where one sheet of a will was found in one county, and another in a different county, both sheets made but one will. *Ib.* 15. It is true, every devise of lands must be entirely in writing; but a bare letter directing how a man's lands should go after his death, has been held a good will. *Ib.* 25. So where a lawyer took notes of a man's will from his mouth, and wrote the will in legal form one hour before his death, this was established as a good will in writing, though the testator did not hear the will read. *Ib.* 26. This goes the whole length of the present case, as to the formal instrument. It has been resolved, that it is not necessary that a will devising real estate in this commonwealth, should be sealed, nor that all the subscribing witnesses should prove the execution, nor that the proof of the will should be made by those who subscribed as witnesses, nor that the will should be subscribed by the witnesses.

Here then we have a proof of the original notes by three witnesses. It is not similar to *Lewis v. Morris* so much relied on. There John Evans alone proved any instructions to have been given in respect of the legacy of 400*l.* 1 Dall. 279. It is true, that

the deposition of Kagey has not been taken with due correctness, but it cannot be denied, that he referred expressly to the notes then lying before the register. If he did not hear all the clauses explained to the decedent, he deposes that he heard them all read, which, is sufficient. But if there is any deficiency in this written testimony it is amply supplied by Messing. He swears to the directions; the reducing them to writing; the reading of them; the preparation of the formal will, and the part reading thereof. His profession would naturally lead him to continue in the room, to watch the symptoms of his patient and administer relief, as events might occur. Mr. Rudisill is admitted to be a complete witness.

The formal instrument is more copious and full than the notes, but we cannot discover the two material variations insisted on. But if it had been varied ever so essentially, and the whole had been read distinctly to Eyster, who in his perfect senses had assented thereto, and the same had been proved by two witnesses, there can be no doubt but it would be sanctioned as his will. Whether there is any material variance between the two writings will be judged of by the court and jury.

By the court. The three first objections made by the defendant's counsel are readily disposed of.

That written declarations of a man's mind how his estate shall go after his death, made *animo testandi*, may amount to a will, when duly proved, cannot be doubted. If they are not sufficiently copious to embrace his whole estate, the consequence would be, that he dies intestate *quoad hoc*, and the same exception would lie to any will duly executed and attested, which did not contain a full disposition. Nor can there be any difficulty on the point of publication. The law requires no particular form of publication. Pow. on Dev. 81. It may be inferred from circumstances, and will have the same force to render the instrument valid, as if expressed by parol declaration. *Ib.* 82.

The only doubt that can arise, is, whether there are two witnesses to prove the written instruments set up, or either of them. Judge Rudisill is admitted to be one full complete witness. Kagey proves the most material circumstances related by the former in detail, and all the papers must necessarily have been before the register, when his deposition was taken on the caveat. Were it necessary, Dr. Messing would supply the place of one witness.

It cannot be pretended, that to establish a will, two witnesses must swear, that they were present and saw it executed. Suppose the subscribing witnesses are dead, or that one or them is

dead, their hand-writing may be proved. So in England, where three witnesses are indispensably necessary to a devise of lands, by the statute of frauds and perjuries. Again, suppose a will here written by the testator himself, may not his hand be proved by two witnesses? We hold moreover, that circumstances may supply the want of one witness, where they directly go to the immediate act of disposition. Analogous hereto was the case of Chamber's lessee v. Weaver, tried at Nisi Prius at Carlisle, before the late Chief Justice, for the specific execution of an agreement made with the late proprietary, Thomas Penn. There the rule in chancery was admitted, that if the fact on which the equity of a bill arises, is denied by the answer, and the equity is proved but by one witness for the plaintiff, he can never have a decree, if it rests on the oath of the defendant against one witness, and no more. The court compared the case of a defendant in ejectment to a defendant in chancery; but declared, that in both instances, the proof would be complete, if one witness swore to the fact directly, and a variety of circumstances where adduced from which the same fact would naturally be inferred. Here the instructions are most to be relied on, as taken immediately from the mouth of Eyser. The formal writing differs from it in some degree. Two writings made immediately after each other, with different dispositions, cannot stand together as the last will of the testator, and the formal instrument must give way to the notes, under the circumstances of this case. We think the latter sufficiently proved under our act of assembly.

The jury found their verdict accordingly.

Messrs. Hopkins and W. Ross, *pro quer.*

Messrs. Duncan and Bowie, *pro def.*

Lessee of MARY GALBREATH, THOMAS JOHNSTON and REBECCA his wife, and EDWARD ABBOT and JANE his wife *against* LEONARD EICHELBERGER.

No one will be compelled to be sworn as a witness, whose testimony tends to accuse himself of an immoral act.

EJECTMENT for three undivided eighth parts of lands in Monaghan township.

It was admitted, that James Dill was seized of these lands. The lessors of the plaintiff claimed as his daughters, and their title depended on invalidating a deed made by their father to their brother John Dill, for the premises, dated 13th of April 1784, in consid

eration of 600*l*. It was contended, that John was then under 21 years of age, and a mere trustee to preserve the title in the family against the effects of two sheriff's bonds, in which the father was surety for Charles Lukens, esq. on one of which a judgment was obtained for 2000*l*. in October term 1784, and on the other for the like sum in October term 1787, and Lukens died insolvent in January 1784; and that another deed for other lands was given to Robert, another son, dated 12th April 1784, in consideration of 300*l*., though he was then in his 17th year, and lived with his father, who managed his farms in the same manner as before giving the deeds.

To prove these circumstances, and that John had, subsequent to his deed, leased the lands in question from his father, and acted under his direction, the plaintiffs' counsel called the said Robert Dill as a witness, who appeared and submitted to the court, whether under the circumstances of the case, he should be compelled to be sworn.

The defendant's counsel objected that he was interested in the question now trying. If the plaintiff can succeed in the present suit, he will have still less to encounter, against a younger brother, confessedly under age, when his deed was executed, for a supposed valuable consideration. Besides his declarations may be given in evidence against him in a future ejectment brought for the lands conveyed to him.

It would moreover be a violation of the maxim "*nemo tenetur prodere seipsum*." Peak Evid. 132. If he has accepted from his father a deed for the lands, with a view to defraud creditors, an indictment will lie against him.

E contra it was answered, that it was now settled that the true principle is, where the verdict cannot be given in evidence, either for or against the witness in any other suit, he may be sworn, because he cannot in such case gain or lose by the event of the cause. Bent v. Baker et al. 3 Term Rep. 27. He must be immediately benefitted or injured by the event, before he shall be repelled from giving testimony. Peak Evid. 93, 94. This principle has been so often recognized in this court, that the point has been deemed at rest. The witness's title is not now in litigation; but the question is, whether or not he is a competent witness in the ejectment against his brother.

As to the application of the maxim, we know not, that an indictment would lie against him for accepting his deed, or that any pecuniary loss could flow therefrom, on his being examined here. The court will not anticipate the questions which may be

asked; some may be propounded which may be wholly unexceptionable, and others may be overruled. The superintending authority of the court will be exercised as occasions arise, and will confine the witness to the point in issue. His deed is not attacked, but it is wished to extract from him, that his brother John was the trustee and tenant of his father of the premises, until the time of his death.

The court were divided in opinion, whether the witness was receivable on the ground of interest. Yeates, J. declared himself in the affirmative, and Smith, J. in the negative. But they readily agreed that he was privileged from giving evidence, under the maxim cited. They could not avoid seeing the tendency of his examination, disguise it as you will. The plaintiffs' strong hold was, that the deeds were executed to protect the property against the judgment, which was to ensue in six months, and that the father and sons combined together to defraud the creditors of the former, and to create a trust for his use. If it should even be conceded, that an indictment would not lie against the witness for agreeing to accept this deed, which though void against creditors, might be good against the grantor and his heirs, yet the combination itself was nefarious and immoral, and would justly subject every person concerned in it to ignominy and contempt, and was therefore with in the construction of the maxim, as lately adopted in *Respub. v. Gibbs*. in bank. The rules of evidence * are founded in reason and good sense.

To oblige the witness to be sworn under the circumstances of this case, would be in effect compelling him to accuse himself of an immoral act, and a violation of his privileges as a citizen.†

The exception is therefore allowed.

The plaintiff suffered a nonsuit.

Messrs. Duncan and Watts, *pro quer.*

Messrs. Bowie and Hopkins, *pro def.*

* The rules of evidence are founded in the charities of religion, in the philosophy of nature, in the truths of history, and in the experience of common life. Per *Brakins arguendo*, *Rex v. Hardy*. Trial 207-8.

† Pennsylvania constitution, art. 9, § 9. The accused cannot be compelled to give evidence against himself.

Rev. WILLIAM RUNKLE *against* SOLOMON MEYER and CHRISTIAN SLECKTUNG.

In a civil action for a libel against a printer, his inserting the name of the author is no justification, though it may go in mitigation of damages.

LIBEL. The defendants published on the 19th September 1800, in the York Gazette, a paper in the German language, at the instance of George Gregor by name, reflecting on the character of the plaintiff, a clergyman of the reformed church of Heidelberg. It charged him among other things, "with having got a cudgelling in Virginia from an inhabitant, whom he persuaded that it was not right to sleep every night with his wife; that she lay alone, and Runkle took the opportunity and came into her room; that the wife gave her husband a sign, and he apprehended him in his roguery and beat him his skin full."

Plea *non cul.* with leave to justify.

After a long trial, wherein the depositions and examination of forty witnesses were read and given, the defendant's counsel insisted, that printing presses could not be free in this State, according to the provisions of the constitution, if printers could be punished for a publication, inserted at the instance of a person, whom they named in their paper, and who paid for it in the usual course of business. Pennsylvania Constitution, art. 9, sec. 7. They were only responsible in cases where they withheld the real authors, against whom the suit should be brought. Libelling was a species of slander, and all slander should be measured by the same rule. Slander by libel differs only from slander by words, that it is delivered in writing or printing. 2 Espin Dig 240. If one relates a slanderous report of another, and gives his author at the time, and the fact comports therewith, it may be pleaded by way of justification. 7 Term Rep. 17. 12. Co. 133-4. And this doctrine was recognized a few days ago a Lancaster, in *Hersh v. Ringwalt*. It has been held that an action will lie for a libel, charging the plaintiff having the ich and stinking of brimstone. *Villers v. Monsby*, 2 Wils. 403. Would it not be an outrage on common sense to say, that if this had been published at the desire of I. S., that the printer should be punished in damages; and that one charging a plaintiff with muder, or gross perjury by oral words, and giving his author at the time, should be dispunishable? An action will not lie against a printer, unless express malice is proved, or it may be fairly inferred from circumstances, as concealing the real author of the publication, &c. If the plaintiff has been injured, he should look to Gregor, who lives

in Fredericktown, and avows the publication. There the transaction alluded to, is supposed to have happened. There the plaintiff officiated at the time as a minister of the gospel, and his true character is ascertained. And there only complete justice can be administered.

The court in their charge to the jury, observe, that the insertion of the publication at the instance of Gregor, did not amount to a justification, in point of law, though it might go in mitigation of damages. 2 Atky. 472. 8 Mod. 123. Slanderous words and libels are not measured by the same rules in courts of justice. The offence of a libel is more heinous, as its circulation of the slander is more extensive, and derives too an additional degree of malignity, from its being done premeditatedly. 2 Espin. Dig. 240. 1 Dall. 324. 2 East. 430. Its excuse rests not on the common infirmity of mankind. It is the mark of a depraved and wicked heart. Any written or printed words, which render a man ridiculous, or throw contumely on him, are actionable. But it is otherwise of words spoken; and this distinction has been long settled. 2 Wils. 403-4. Fitzgib. 121, 253-4. Bos. and Pull. 331. The law adapts itself to the usages and habits of mankind, but it cannot be expected to administer to foul malevolence; and hence in the case cited, wherein the party was charged in a copy of verses, with having the itch, a difference obtained between a libel and words spoken. Our reading does not furnish us with a *dictum*, much less a solemn adjudication, that a printer is justifiable in disseminating libellous papers, though he has received a pecuniary compensation therefor in the way of business. But we know that the English judges have laid it down, that writing the copy of a libel, is writing of a libel; and if the law were otherwise, men might write copies and print them with impunity. 2 Salk. 417, 419. It will not be denied, that if one designedly bespatters another's clothes with filth, as he passes the street, though at the instigation of a third person, he would be liable for damages. And shall a printer with his types, blacken the fairest reputation, the choicest jewel we enjoy, and go scot free, merely because he has told the world that the paper is inserted at the request of G. G.? It is true, that there are shades of guilt in this offence, and that the author is more criminal than the printer. The one prepares the poison with malice aforethought, the other administers it to the world. Some instances occur, where the prosecution against the printer has been stopped, on the author's being given up, or avowing himself, but this only shows, that the latter is deemed the greater offender; and the printer may show this in alleviation. 8 Mod. 123. Fortese. 201. 2 Atky. 472. We do not know what difficulties may be interposed in the plaintiff's way

in a suit at Fredericktown. The minds of the congregation may have been much heated in the acrimonious dispute which has subsisted between him and the German clergyman of the same persuasion. It is not necessary in an action for a libel, to prove express malice; if it be slanderous, malice is implied. 1 Term Rep. 111. That the present publication against a clergyman is libellous, no one can doubt.

What has been called the liberty of the press, (1 Dall. 330,) is much misunderstood; and the most erroneous opinions have been formed of the state constitution in this particular. The 7th section of the 9th article of that instrument has provided, that "in prosecutions for the publication of papers, investigating the official conduct of officers, or men in a public capacity, or where the matter published is proper for public information, the truth thereof may be given in evidence. Every citizen may freely speak, write and print on any subject, being responsible for the abuse of that liberty." Indictment for libels against individuals, where the matter published is improper for public examination, remain in their former state, and the truth thereof cannot be given in evidence. In civil actions at the suit of persons, either in a public or private capacity, the party is answerable in damages, if he cannot verify the charges he has made. This is the present case, and the plaintiff is entitled to a verdict. Of the measure of damages, the jury are the sole judges, under the mass of evidence submitted to their consideration.

Verdict *pro quer.* for \$8 damages, and full costs.

Messrs. Bowie and C. Smith, *pro quer.*

Messrs. Hopkins and W. Ross, *pro def.*

Lessee of HENRY WILLIS *against* ERNST ROW.

One discharged as an insolvent debtor, cannot support an ejectment for lands previously vested in him, though his trustees have not given bond pursuant to the act of 4th April 1798.

EJECTMENT for lands in Newberry township.

The lessor of the plaintiff made title as heir at common law in tail, under the last will of his grandfather, Henry Willis, through his father William Willis. The said William Willis, on the 2d April 1796, sold and conveyed the premises to the defendant's landlords, in consideration of 900*l.* without having suffered a common recovery, and died insolvent.

It was objected, that the lessor of the plaintiff had on the 9th September 1799, applied to the Court of Common Pleas of

Dauphin county, for the benefit of the insolvent act, with a list of his debts and credits, and had been discharged on his assignment of all his property, real, personal and mixed, to Jacob Burkhart and Nicholas Ort, in trust for the use of his creditors.

The plaintiff's counsel insisted, that no bond appearing to have been given by the trustees with security for the faithful performance of their trust, pursuant to the 3d section of the act of 4th. April 1798, the assignment vested no title in them under the law 4 St. Laws 271.

Sed per cur. The words of the act are, "every trustee before he acts as such shall give bond," &c. The insolvent debtor is divested of all his property at the moment of the assignment, though the trustees cannot act until they have executed bonds, under the strict words of the law. We have found it impossible to carry this law into effect in this particular; and during its continuance we are persuaded, that far the greater number of trustees appointed by the Supreme Court have not given bonds. Few persons will devote their time to the service of others, and give security for that purpose, in cases where the prospect of obtaining payment of their debts is very small and remote. But it would be monstrous to suppose, that an insolvent debtor, after assigning his estate, and his person is freed from arrests, could maintain an ejectment for lands vested in him previous to his discharge, his debts remaining unpaid. If this could be tolerated, because the trustees had not given bond, he might sell his lands the moment after his discharge, and bid defiance to his creditors.

Plaintiff nonsuit. }

Messrs. Duncan and C. Smith, *pro quer.*

Messrs. Bowie and Hopkins, *pro def.*

SAMUEL GROSS *against* FREDERICK ZORGER.

Reports of referees will not be set aside for slight causes, but only for a clear mistake in law or fact, affecting the justice of the case.

Referees' reports will be judged of liberally, but they must adhere to the established essentials of actions, unless a latitude is allowed in the submission.

And therefore, if in debt for a penalty, conditioned to do a collateral act, the award exceeds the penalty, and interest from the time of performance, the report will be set aside.

EXCEPTION to the report of referees.

The action was brought in debt for 100℥. on a bond, dated 28th

February 1777, reciting that whereas the defendant had sold a certain tract of land to the plaintiff for 50%, if the defendant should well and sufficiently convey the premises to the plaintiff, the bond to be void ; otherwise to remain in full force.

Bartram Galbraith afterwards in April 1791, recovered the premises in ejectment, and the plaintiff compounded with him, and bought his title.

All matters in variance were referred by agreement of the parties, to Conrad Laub, Joseph Glancey, Eli Lewis and John Hay, any three of whom were to report ; but in case of disagreement, they had liberty to choose a fifth referee. The referees met according to the rule in the presence of the parties, and the witnesses were examined on oath and affirmation administered by a justice of the peace, and the substance of their testimony reduced to writing by the referees ; but the deposition of Galbraith aforesaid was taken fully and at large by the justice at that time, as being deemed most material to the points in controversy. The referees divided in opinion, and chose Jacob Barnitz, esq., as the fifth man ; and Laub, Hay and Barnitz awarded, that the defendant should pay to the plaintiff 217*l.* 11*s.* All the papers and depositions were shown to Barnitz in the presence of the parties, and he examined them.

The deposition of Galbraith was exhibited to the court ; but the notes of the testimony of the other witnesses were mislaid by one of the referees.

Several exceptions were taken by the defendant's counsel to the report, which was signed on 2d September 1801.

1. It was incumbent on Barnitz to have been present when the witnesses were examined, agreeably to the rule laid down in the Supreme Court, in two late cases. It is possible that certain questions might have occurred to him, the answers whereto might greatly elucidate the subject in dispute ; and this must have been the ground to the rule.

2. The referees have exceeded the penalty of the bond, and any interest which could possibly accrue thereon. The present bond is within the depreciation act of 3d April 1781, and falls within the 2d and 4th sections thereof. 1 St. Laws 880. It is a debt or contract entered into between the 1st January 1777, and 1st March 1781, and must be adjusted agreeably to the scale therein contained. It is a stipulation to pay a certain sum, unless a certain act is performed ; and as the 50*l.* paid for the lands must be presumed to have been made in the then existing currency, when the rate was one and a half for one, so also must have been the 100*l.* penalty rated. But if the scale of depreciation should not be supposed to be applicable here, and the 100*l.*

should be considered as specie, the sum found due exceeds the measure of damages settled by the parties. A deed was executed by the defendant, which it was supposed would well and sufficiently convey the premises to the plaintiff, but unfortunately a paramount title existed. Until the party was evicted, there was no cause of action; and calculating interest on the entire 100l. from that time, it will fall short of the debt found due. It may be compared to actions of trespass or case, where the declaration concludes to the damage of the plaintiff 100l.; more than that sum cannot be recovered. If the defendant here had confessed judgment by *nil dicit*, could the plaintiff have gone beyond the penalty and consequent interest? When the party proceeds for a penalty, he may go on, *toties quoties*. 3 Burr. 1345. The penalty of an indemnity bond ascertains the damage by consent of parties, and the plaintiff is entitled to recover no more. 2 Bl. Rep. 1190. Equity will relieve against a penalty, but never go beyond it. 4 Burr. 2228. In case of an eviction equity will not go beyond the penalty of a bond conditioned for quiet enjoyment. 1 Equ. Ca. Abr. 92, pl. 5. Cites 1. Cha. Rep. 95, S. P. 1 Vern. 350. In *Perit ex'rx. v. Wallis*, 2 Dall. 253, it was not contended, that in debt for a penalty, the plaintiff might recover more than the stipulated sum, and interest from the time of performance of the contract.

Referees must conform to the species of action as well as jurors; they cannot go beyond what a jury might do in the particular case. Their report, "when approved of by the court, shall have the same effect, and shall be deemed and taken to be as available in law, as a verdict given by twelve men." 1 St. Laws 66, sec. 3. It will not be asserted, that in an action brought to recover money, referees can award the possession of lands, or that in detinue or trover, they are allowed to depart from those rules which are obligatory on juries. If in an action for money had and received, they should report that a certain horse should be delivered, or in slander that a certain tract of land should be conveyed, the court could not sanction such reports.

3. The award is inequitable and unjust. Instead of finding the sum paid by the plaintiff and interest thereon, the referees have gone on the mistaken principle of finding the sum he had paid to Galbreath on his composition, and the interest thereon. On the same ground, if 1000l. had been paid to him, that amount might have been awarded. No improvements have been made on the lands, nor has the defendant concurred in the purchase of Galbraith's title. Still however, if the plaintiff's counsel conceive a better case may be made for their client, we will agree, that they may file a declara-

tion in covenant, to which we will plead, and try the cause at the next court, on the present report being set aside, on its full merits.

The plaintiff's counsel answered, that the decision of the Supreme Court with respect to the umpire hearing the witnesses, is not applicable to this case. The referees have testified, that the chief evidence before them were the written title papers, and that the only material witness examined was Bartram Galbraith, whose deposition was fully taken at their desire, by an intelligent magistrate. Some other testimony of little moment was taken by themselves, and reduced into writing. But the whole was submitted to the examination and consideration of Mr. Barnitz, and consequently he had the same opportunity of being informed of the merits of the case, as the other referees.

Neither is the depreciation act applicable to the obligation. It is not a contract for the payment of money, but to do a collateral act. If auditors had been appointed under the law of 1781, they would have said, the act does not apply hereto, and under the 4th section would "settle and adjust the same, according to equity and good conscience, upon due consideration had of the nature and circumstances of the case."

We contend therefore, that the debt found, does not surmount the penalty of the bond. The case cited from 2 Dall. 252, shows that interest may be legally computed from the time of performance of the contract, on the penalty. Allow only 20 years interest on 100%. specie, and added thereto, it would exceed the 217%. 11s. at the time of making of the award which goes on the principle of allowing the defendant above four years to make a sufficient conveyance of the premises. Here the deed was an absolute nullity, and conveyed no title, and the penalty of the bond then became forfeited.

But admitting for arguments sake, that the time of eviction was the period from which interest should be calculated on the penalty, by the strict rules of law, are we presumed to have had no views, when we agreed to enter into the reference? If we had thought that our form of action was ill adapted to our client's interests, might we not wish to get rid of our legal trammels, and be put in the same situation, as if we had brought covenant on the specialty? In this mode of suit, it is admitted we might recover damages, to the amount of any injury we could prove. 2 Dall. 254. On a general reference, the arbitrator has a greater latitude than the court of chancery, in order to do complete justice between the parties. 1 Ves. jr. 370. By a submission to arbitration, a court both of law and equity divest themselves of all judgment on the facts. 2 Ves.

jr. 24. If this consideration had not prevented the plaintiff, he might have proved to the court, that besides other improvements, he has erected a new barn on the premises ; and that the composition made with Galbraith, was effected with his full knowledge and concurrence. We rely on this, that in order to impeach an award, palpable error must be shown, which would produce injustice.

The court took some time to advise, and afterwards delivered their opinion in substance as follows :

We adhere to the principle, under which we have frequently acted, that reports should not be set aside on slight grounds. A clear, plain, evident mistake, either in law or fact, which affects the justice and honesty of the case, must be satisfactorily shown to the court, before they will deem themselves authorized to interpose ; but where such an instance occurs, their interference becomes a matter of indispensable duty.

The first ground of objection does not appear warranted by the determination of the Supreme Court in the cases of *Falconer v. Montgomery and Newbold*, and of *Passmore v. Petit and Bayard*, at the last term, for the reasons given by the plaintiff's counsel.

But we cannot help thinking, that the referees have adopted an erroneous principle of decision, by finding the sum paid by the plaintiff to Galbraith, on his second purchase, and the interest thereon as the measure of damages, unless the same was effected at the instance of the defendant, or he agreed thereto subsequently. The utmost length they could have gone, if the repayment of the original purchase money and interest would not be a sufficient compensation for the damages, which the plaintiff has sustained, would be to award the value of the premises at the time of the eviction, and the intermediate interest. We do not go so far, as to lay this down as an uniform rule of decision, which ought to prevail on title bonds of this nature.

Whether the debt found due to the plaintiff, exceeds the penalty or not, will depend on the period from which the interest is calculated. If the 100*l.* is reduced by the scale at the rate of $1\frac{1}{2}$ for 1, it will certainly exceed it, though we should compute the interest from the time of the contract. On this point however, we give no opinion whatever whether the depreciation act applies, or not. But from what period, shall the interest commence, if the penalty is not reduced by the scale ? We think from April 1791, when Galbraith recovered against the plaintiff. Until that time, the plaintiff was in possession under the defendant's deed, and in the

perception of the profits, and the right was unascertained.

The intermediate time from thence till the signing of the report, we may call 10 years and 5 months, which would produce the interest of 62l. 10s. and added to the principal, would form an aggregate of 162l. 16s. It would require 55l. 1s. more, to make up the 217l. 11s. found by the referees, as due to the plaintiff.

The court will be liberal, when judging of the reports of referees; but the nature and settled forms of actions must be preserved by them equally as by juries. Reports approved of by the court, have the same effect as verdicts, but are not more available. Referees must adhere to the established essentials of actions; otherwise their reports, though established by the court to which they are returned would be set aside on error. We must necessarily be supposed to mean such cases only, where a deviation from the usual rules is not allowed by the terms of the submission.

We therefore find ourselves constrained to set aside the report; but it shall be on the terms offered by the defendant's counsel during the argument. Let the plaintiff be at liberty to file a new declaration in covenant, and an agreement be subscribed for that purpose by the defendant's counsel; an issuable plea be put in, and the cause tried at the next Circuit Court. And if there is any danger whatever of the debt, as there is an acknowledged sum due, let judgment be entered by way of security. Substantial justice will be done thereby to both parties, and if the defendant has been the means of subjecting the plaintiff to additional losses and expenses, it will have due weight with the jury.

Messrs. Bowie and Hopkins, *pro quer.*

Messrs. Duncan and Cassat, *pro def.*

AT A CIRCUIT COURT, HELD AT CARLISLE, MAY, 1803.

CORAM, YEATES AND SMITH, JUSTICES.

Lessee of JOHN FORBES *against* ARMSTRONG CARUTHERS and ANDREW CARUTHERS.

Mere opinion is no evidence ; but the opinion of men of science on facts stated, may be received, to inform the jury.

EJECTMENT for lands in Pennsbro' township.

The plaintiff claimed under a survey made in 1744, which called for John Ruddock's lands on the three last courses, and was bounded by Coneodogwinet creek. The survey would not close on protraction, and in order to reach Ruddock's line, it required that the second line should be extended 40 perches, and to come to the creek that the third line should be extended 40 perches.

It was evident therefore that some error had obtained in the survey, and it was asserted on the part of the defendants, that it must have arisen from the first line being called 278 perches in length instead of 225 perches. This line had been run the day preceding the plaintiff's survey for William Dunbar, by the same surveyor.

Samuel Lyon, esq. was offered as a witness to show how in his opinion the mistake must have originated, and was opposed by the plaintiff's counsel.

Sed per cur. Mere abstract opinion is not evidence ; but a surveyor, or any other person conversant in the subject, may state facts, and his opinion on those facts, to enable the jury to form a correct judgment of the matter in dispute. It is general information in a question of science, which others unacquainted with the subject must necessarily want. Thus a physician, who has not seen the particular patient, may, after hearing the evidence of others, be called to prove on his oath, the general effects of a particular disease, and its probable consequences in the particular case. Peake on Evid. 137.

Messrs. Hamilton and Watts, *pro quer.*

Messrs. Duncan and C. Smith, *pro def.*

AT A CIRCUIT COURT, AT HUNTINGDON, MAY, 1803.

CORAM, YEATES' AND SMITH, JUSTICES.

Lessee of DANIEL GRIPE *against* Reverend DAVID BAIRD.

A survey made by a succeeding deputy surveyor on a warrant directed to his predecessor in the same district may be supported under the practice. But a survey on a warrant unsigned by the governor for the time being, unless money has been paid thereon to the receiver general previously, is invalid.

EJECTMENT for lands in Allegheny township.

The plaintiff claimed under a warrant issued to Samuel Smith, for 100 acres in the forks of the north branch near the mouth of Beaver Dam, about 3 or 4 miles from James Lowrey's, dated 3d February 1755; upon which a survey of 118 acres, and allowance was made on the 3d December 1774, by Thomas Smith, esq. (D. S.)

The original warrant directed to Richard Tea, the former deputy surveyor of the district, and endorsed by Mr. T. Smith, "executed 3d December 1774, Spring Meadow," together with two other office copies of the warrant, were severally unsigned by the governor.

Mr. Smith was examined as a witness, and proved that it was the uniform practice for succeeding deputy surveyors to execute warrants directed to their predecessors, without a new direction for that purpose; and such survey had been invariably received in the surveyor general's office; but having made the survey, Mr. Smith declined sitting as a judge in the case.

After the testimony was closed, Yeates, Just. interrupted the defendant's counsel who were opening their defence. He said, Judge Smith's testimony had fully obviated one difficulty which presented itself, respecting the survey; but he thought it impossible to support the survey, unless the original warrant had been signed by the governor for the time being, as the chief commissioner of the Board of Property, or money had been paid thereon to the receiver general. The objection however appearing to be a surprise on the plaintiff's counsel, which they were unprepared to meet or answer, he recommended that a juror should be withdrawn, on the lessor of the plaintiff paying the costs of the court.

This recommendation was agreed to, and the plaintiff's coun-

sel engaged to discontinue the suit before the next court, unless it could be proved that money had been paid to the receiver general on the warrant, previous to the survey.

Messrs. Duncan and Riddle, *pro. quer.*

Messrs. Hamilton and Walker, *pro def.*

Lessee of JAMES ARMSTRONG, JOHN ARMSTRONG and THOMAS DUNCAN *against* ISAAC MORGAN.

Letter from the secretary of the land office to the deputy surveyor, to make a survey, if lost and no memorandum of it to be found in the land office, may be proved by parol evidence. On a vague warrant or location, the title vests from the time of survey: but on shifted ones, not until the return of survey, unless the adverse party knew of the survey, prior to the commencement of his right.

EJECTMENT for 500 acres in Shirley township.

The plaintiff's counsel stated, that his claim depended on a written order signed by Richard Peters, esq. directed to Col. John Armstrong to survey for George Croghan, es.q 4000 acres on Aughwic, Juniata and Dunning's creek in 1761, whereon three surveys were afterwards made in November, in the same year; that one of the said surveys was appropriated to Jeremiah Warder and company, one, other to George Ross, and the last to the said John Armstrong including the lands in question, for which a warrant of acceptance issued to him on the 8th March 1774. That the said written order was afterwards burnt in the house of Col. Armstrong in 1763, but the survey so made, was recited in a patent, dated 19th October 1773 granted to James Foley under the claim of Warder and Franks, "to have been made by the consent and direction of the proprietaries for George Croghan." And after showing the said warrant of acceptance and patent, they offered to prove the contents of the said written order by parol evidence.

The defendant's counsel admitted, that the destruction of Col. Armstrong's house was a known fact, but contended, that it was of great consequence to establish an authority to survey 4000 acres of land by oral testimony. Some traces must remain in the land office of the instructions whereon the written order was founded, or some memorandum thereof, which ought to have been produced. Besides the warrant of acceptance states that the "survey was made at the request of George Croghan about ten years before, but without a warrant." If the secretary's letter had been the ground on which the survey was made, it would have been so recited. Here the defendant claims under an actual settlement of the lands made in March, 1771.

The plaintiff's counsel offered to show that the land office had been searched, but no vestiges of the written order could be found, and

cited 1 Dall. 6. This the defendant's counsel dispensed with.

By the court. The objection made goes rather to the operation of the evidence offered, than to its admissibility. The great rule of evidence is, that none shall be admitted, which supposes superior evidence behind in the power of the party. Gilb. Law Evid. 16. Bull. 289. If an instrument be lost, after proving that it did once exist, it may be proved by a copy, or if there be none such, by witnesses *viva voce*. 2 Equ. Cas. Ab. 409, 410. The law for necessity admits that, which of all things it most abhors, parol evidence of deed. Even the copies of records which have been lost, may be given in evidence, though not proved to true copies. It is admitted, that all the official papers of Col. Armstrong were burned in 1763, and this order must be presumed to have been amongst them. The land office has been searched, and nothing remains in the plaintiff's power except the parol evidence offered, which ought to be received, and its operation weighed dispassionately.

In the course of the argument, Mr. Walker for the defendant insisted, that the order to survey the 4000 acres being indescriptive, the legal right did not vest until the return survey; and it had been so determined at Sunbury in Funston's lessee *v.* M'Mahon, October 1797.

Yeates, J. That case is perfectly familiar to me. The applications on both sides designated other lands, than those in dispute. The members of the court disagreed in opinion. M'Kean, Chief Justice, held, that until the warrant of acceptance issued no right vested in the party on a shifted application. I thought that the return of survey was *prima facie* evidence of its acceptance, and I still adhere to that opinion. But it has always been understood, that on an indescriptive location, wanting precision in its terms, the interest vests from the time of survey.

Smith, J. Such has been the invariable rule on vague warrants or applications. On shifted locations, the title does not vest until the return of survey into the surveyor general's office, unless the owner of the adverse title had notice of the survey prior to the commencement of his right. And so have been the different adjudications, that I know of.

Verdict, *pro quer.*

Messrs. Duncan and Watts, *pro quer.*

Messrs. Hamilton and Walker, *pro def.*

SEPTEMBER TERM, 1803.

CORAM—SHIPPEN, CHIEF JUSTICE, YEATES, SMITH AND BRACKENRIDGE,
JUSTICES.

ROBERT RITCHIE *against* ANDREW SUMMERS and WILLIAM COATES.

Where one interested in a promissory note drawn by A, payable to the order of B, and purporting to be indorsed by B, sells it *bona fide* and without any improper conduct, by delivery, and without indorsement to C, and receives the money, C, may recover back the money so paid, if it turns out that the indorsement of B, is forged, without tendering the note to the seller, previous to bringing the suit.

ACTION for money had and received.

The cause came on to trial on the 29th June 1802, at the sittings for Philadelphia county, when the jury found the following special verdict :

The jury in this case, on their several oaths and affirmations, do find from verbal and written testimony, that the defendants did, on the 19th July 1798, receive a certain note of hand from and drawn by Joseph Thomas, dated 19th July 1798, at 60 days after date, payable to the order of John Morton, for \$3000, and indorsed with the name of John Morton. That on the same day the defendants charged in their books of account to the debit of the said Joseph Thomas, the drawer of the said note, the sum of \$2900 cash paid and advanced to him, whereby they became interested in the said note, having so paid for it on the day they received it : and that they did hold this note and continue their interest therein until the 23d day of July aforesaid, when they the defendants sold the said note to Robert Ritchie the plaintiff, at a discount of one and an half per cent, per month, or thereabouts, on the principal, for the unexpired time thereof. That the said plaintiff did pay on the 26th July \$1600, and on 31st of the same month \$1314⁸⁰/₁₀₀, making together \$2914⁸⁰/₁₀₀, being the net amount of the said note due to the defendants. That they the defendants, did, on the 23d July give the said Joseph Thomas credit for the said sum so to be received of the plaintiff, deducting first therefrom \$15 for their commission, and a further sum of \$10, or thereabouts, for discount, being at the same rate of one and an half per cent per month, as was allowed by them to the plaintiff, thereby confirming the interest they held in the said note, during the time it remained in their hands. That soon after it was discovered, that the supposed indorsement of John Morton on the said note, was, and it now appears to the jury, is a for-

gery. That therefore the said note is proved not to be what it was sold for by the defendants, who were so interested therein ; but no appearance, even of improper conduct, on the part of the defendants exists. The said jury, if the court are of opinion on this case, that the plaintiff is in law entitled to recover back from the defendants the said sum of \$2914⁵⁰/₁₀₀, and interest thereon, do therefore further find for the plaintiff in the sum of \$3631³³/₁₀₀ damages, and sixpence costs: and that he do restore the said note of \$3000 to the defendants. And if the court should be of opinion, that the law is in favor of the defendants, then the jury find for the defendants.

Philadelphia, June 29th, 1802.

The special verdict was argued on the 15th and 16th days of March last, with great ingenuity, by Messrs. Lewis and Gibson for the plaintiff, and by Messrs. Ingersoll, M. Levy and Todd for the defendants; but, as it is believed, that all their arguments and law authorities have been noticed by the court, in the opinions which they delivered *seriatim* this term, their arguments are omitted in this report.

Shippen, C. J. The special verdict in this case finds facts very favorable to the cause of the plaintiff, absolutely precluding the idea of the defendants acting as the agents of the drawer of the note. They find, that the defendants became interested in the note, by having paid Thomas the full amount of it, and that the interest continued to the time of the sale to the plaintiff. They likewise find, that the name of the indorser was forged, and that the note was not what it was sold for to the plaintiff. It is no doubt usual and lawful to sell notes by delivery, without an indorsement by the seller; and in all such cases there is no responsibility on the part of the seller. This want of responsibility however, from the nature of the transaction, is confined to the solvency of the parties, whose names appear on the paper; but being a representation, that such names were really the signatures of such parties, if it afterwards appears that representation was false, I can find no reason or law, that discharges the seller from being accountable for the misrepresentation, by refunding the money he has received. When paper money, or what were called bills of credit, were in circulation, if a counterfeit bill was passed by one person to another, although both were ignorant of its being a counterfeit, there never was a doubt, but that the prayer was answerable over to the payee. So now in the case of bank notes payable to order, instead of bearer, if the name of the payee should be

forged and the note on that account should be refused at the bank, can it be doubted, that he who passed it would be answerable to the receiver?

We were put in mind of the case determined by this court, of *Levy v. Bank of United States*; but that case was determined upon very different principals. The Bank there were bound to know the signature of the person, who appeared as the drawer of the check, and did actually accept and pay the draft, or what was the same thing, credited the holder in his bank book. My opinion is in favour of the plaintiff, on the special verdict.

Yeates, J. The court in forming their judgment on this special verdict, are confined to the facts expressly found by the jury. No inference or implication of any material fact is allowable. 3 Burr. 1376.

The first question which presents itself is, whether the defendants are to be considered as principals or agents in this transaction?

That the moneys produced by the sale of the note have not been paid over by them to Joseph Thomas, is ascertained, because they have credited themselves therewith. It is true, they have charged him with a commission of \$15, and a further sum of \$10, or thereabouts, for discount, at the rate of one and an half per cent. per month, the same as they afterwards allowed to the plaintiff, and have deducted the same thereout. But notwithstanding this, they cannot possibly be viewed as mere agents or brokers; because, on the 19th July 1798, when they received the note, they paid and advanced to Thomas \$2900; and it is found by the jury, that "they became interested in the said note, having so paid for it on the day they received it, and continued their interest therein until the 23d July aforesaid, when they sold the same to the plaintiff, and confirmed their interest by giving credit for the amount of sale, deducting their commissions and discount."

If indeed, the defendants had acted in the mere capacity of brokers, and paid over the money to their principal, they would not be responsible to the plaintiff. But it is evident, that they gave an anticipated credit to Thomas, and looked to the sale of the note, as the channel of reimbursement.

It has however been insisted, that admitting the defendants to be principals, they are not answerable over to the plaintiff, because the legal maxim *caveat emptor* applies. In support hereof, two cases have been adduced. One cited by the Lord Chancellor, in 3 Ves. jr. 235, where one had bought an estate, and was evicted of one moiety, on

a clear defect of title, not guarded against by covenant, no equity could be raised in his behalf; and the other of *Bree v. Holbech*, Doug. 654, where an administrator with the will annexed, found a mortgage amongst his testator's papers, and transferred it *bona fide*, as a marketable commodity, there could be no recovery against him, on the mortgage's turning out to be forged, as it was incumbent on the assignee to look to the goodness of the mortgage, or guard himself by proper covenants. 1 Fonbla. 109, 110.

To this it is answered, that the rule of "*caveat emptor*," is very unconscionable, and is now exploded. 2 Woodes. 415. 3 Woodes. 199. When applied to a retention of the purchase money, according to the ludicrous remark of a late writer, the words may be translated, "the devil take the hindmost." (Evan's essays on money had and received, pa. 32) But at most, it is applicable to the sales of real and not of personal property. One selling, goods, undertakes that they are his own and an implied warranty respecting the title of the vendor, is annexed to every such sale. 2 Bl. Com. 452. 4 Bl Com. 164-5. *Bree v. Bolbech*, which savours greatly of hardship, was determined on the plea of the statute of limitations; and the replication did not suggest a fraud, which could take it out of the statute. But in the case of a mortgage, the estate is absolute at law, or default of payment; and on the death of the mortgagee, goes to his heirs or devisee, though the money is payable to his personal representative. 1 Fonbla. 259. A mortgage conveys the legal interest in the lands in form, though it is only a security, and the mortgagee has but a chattel. Doug. 610, (632.) Indeed formerly, the mortgaged premises were deemed subject to the dower of the wife of the feoffee, and all other his real charges and incumbrances, Cro. Car. 191; though the rules of equity are changed at present in these particulars. 2 Freem. 43, 66, 71.

The law seems to be well settled, that where one having the possession of any personal chattel, sells it, his bare affirmation amounts to a warranty; though it is otherwise, where the seller is out of possession, for there the rule "*caveat emptor*" applies. And so it is, in the case of lands, whether the seller be in or out of possession. 1 Salk. 210. 1 Ld. Raym. 593. 1 Show, 68. Cro. Jac. 474.

It is worthy of observation, that in *Crips v. Reade*, 6 Term. Rep. 606, where one sold a leasehold estate from which the purchaser was evicted for want of title, but no assignment or other written conveyance was made, a recovery was had by the vendee of the purchase money. Lord Kenyon there said, he did not wish to disturb the rule of "*caveat emptor*," adopted in *Bree v. Holbech*, and in other cases, where a

regular conveyance was made, to which other covenants were not added. But here, the leasehold passed by parol. This adjudication is bottomed clearly on the principle, that no engagement shall be implied, which is not expressed, where there is a formal contract. But "where the whole passes by parol, and proceeds on a misapprehension of both parties, and the money is paid under a mistake, an action for money had and received, will lie to recover it back." *Ib.* 607. The distinction appears founded on sound policy and good sense, and particularly so, as referable to lands, which are permanent in their nature. The decision has considerable force in my mind.

In the conclusion of the argument, the defendant's counsel did not deny, that whoever sold a chattel, of which they were in possession warranted the title; but they warmly contended, that this implied warranty was not applicable, either on principle or precedent, to mere choses in action, sold without any formal assignments, which were *sui generis*.

I shall proceed to consider their arguments in detail, and the animadversions made thereon.

It was said for the defendants, that nothing was more common, than to offer notes with indorsements on them for sale, in market; and it never was supposed, that the seller was responsible, either for the solvency of the parties, or the genuineness of the instruments. No distinction can be shown, that the vendor should be liable for the latter and not the former. Even on the written assignment of a bond, the assignor is not answerable, if the money be not recovered. 1 Dall. 449. If the assignee buys a bond at 20 or 30 per cent. discount, he is out of the act of usury, because he runs the risk of forgery. *Ib.* 217. This evinces, that it is incumbent on him to inform himself, of the hand-writings on the paper, as subscriptions; and the plaintiff's means of information in this particular, were equal to those of the defendants. The only mercantile mode known, of warranting a bill of exchange or promissory note, is by indorsement. In the cases of bills payable to order, bought at a discount, the indorser is liable; but where they are payable to bearer, they pass by delivery, and it is an absolute purchase; and the person thus transferring, ceases to be a party to the bill or note. *Lambert v. Pack.* 1 Salk. 128, (7th Resol.) 1 *Ld. Raym.* 442. 12 *Mod.* 341. 4 *Vin.* 248, pl. 9. So a note may be warranted by special agreement without indorsement. 2 *Ld. Raym.* 753.

It is true, that Kyd, in his treatise on bills of exchange and promissory notes, in his 1 ed. pa. 60, says, that as between the transferer and the person who receives the bill or note, there may be a recovery back, if the money is not paid thereon, in an action for money had and

received. But in his 2d. ed. (pa. 90) he asserts, that if the bill or note be discounted for the accommodation of the transferer, then the transfer is a sale ; and he who sells it, does not become a new security, and is not liable to refund the money, if the bill or note should not be paid. According to the civil law, the defendants are not liable. 1 Pothier on sales 200-1. If the parties do not explain themselves, the seller is not answerable. 2 Poth. 75, § 2.

To this, it is answered on the part of the plaintiff, that though endorsed notes are marketable articles, yet it never has been considered here, that the seller of a note guaranteed the solidity of the maker or indorsers. His refusing his subscription thereto, is supposed to imply that he is not to be responsible if the payment cannot be exacted. But an evident distinction exists, obvious to common sense, and the reason and understanding of all mankind, when one undertakes to transfer what does not exist, a note drawn by Thomas indorsed by Morton. It is analogous to the payment of a counterfeit bank note payable to bearer, or of a forged bill of credit, previous to the adoption of the present constitution of the United States, upon any contract or it may more correctly be compared to the delivery of a bank post note payable to order, whereon, the signature of the original payee has been forged. In neither of these instances, can it be pretended, that such transfer would be sanctioned. Besides, in the case before the court, the defendants possessed sources of knowledge superior to the plaintiff. It is not found, that the plaintiff had any dealing with the drawer or indorser ; but the defendants must necessarily have had transactions with Thomas, because on the credit of his note, they advanced him \$2900.

It was also said for the defendants, that the holder of a bill may recover, though the payee was fictitious, where that fact was known to all the parties concerned in drawing the bill. 3 Term Rep. 174, 182. And between the plaintiff and the maker of the note, the former could certainly be entitled to recover against the latter. John Morton, though a person in existence, had no interest in the note, but his name was merely made use of ; and this distinguishes it from Mead v. Young 4 Term Rep. 28, where there being a real payee interested in the bill, and his name forged, it was held, that no property passed thereby.

The plaintiff answers, that this note is payable to order and not to bearer. He cannot use the name of Morton in the institution of a suit, unless authorized by him. He cannot deduce a title through him, because his signature is forged. To a bill payable to order, the holder can have no title, unless the payee has actually expressed his order by indorsement. Kyd. 134. A transfer by in-

dorsement, where that is necessary, can only be made by him, who has a right to make it; and that is strictly only the payee or the person to whom he or his indorsees have transferred it, or some one claiming in the right of these parties. Kyd. 68. Bayl 15. 1 Salk. 126. 3 Salk. 70. 1 Burr. 452. Doug. 633. But even admitting that verdict might be had against Thomas, the great objection remains, that no recurrence can be had to Morten, because his endorsement was forged.

It was insisted again by the defendants, that the jury having acquitted the defendants even of the appearance of improper conduct, an attempt was now made to throw the loss off one innocent man on another, which the law would not permit. Thus, money paid by the acceptor of a forged bill to a *bona fide* indorser, cannot be recovered back; 3 Burr. 1354. 1 Bla. Rep. 390. 4 Term Rep. 325, 335; and on this ground, was the case of Levy v. The Bank of the United States, determined in this court. So a payment to an executor under a forged will, is good against a subsequent administrator. 3 Term Rep. 127. And a payment under a forged bond or bill, is styled by Ashurst and Grose, Justices, a voluntary act. *Ib.* 229, 132. The holder of a bill selling it without indorsement, neither morality nor law will compel him to refund the money for which he has sold it, if he did not know at the time that it was not a good bill. Per Ld. Kenyon, 3 Term Rep. 759, Fenn v. Harrison. By refusing to indorse, the party refuses to pledge his credit for the validity of the bill. Espin Rep. 447, Fidell v. Clarke. So a horse sold under a false pedigree, without a warranty, there can be no recovery back. Peake 123, Dunlop v. Waugh. Where an unsound horse has been sold for a sound price, without warranty, the plaintiff must lay in his declaration, that the defendant knew the horse to be unsound. Doug. 20. Indeed the cases respecting soundness of price, more particularly refer to the article of horses. 2 Bla. Com. 455, Christian's note 9. If the defendants have been negligent, in not making inquiry concerning the signature of Morton, the same laches may be imputed to the plaintiff, who kept the note for eight days. If the purchaser wants attention in those points, where attention could protect him from imposition, the rule of "*caveat emptor*," will apply. 1 Fonbla. 871-2. The defendants have fairly paid the full value of the note to Thomas. The plaintiff has done no more to the defendants.

The parties being thus equally innocent and meritorious in the whole transaction, the court will not interpose between them. The rule of the law will apply; "*in pari delicto, melior est conditio possidentis*," according to the cases Lowrey v. Bourdieu, Doug. 451. Andre

et al. v. Fletcher, 3 Term Rep. 266. Browning v. Morris, Cowp. 792, and Tomkyns v. Barnet, Skin. 411. A judgment for the plaintiff would materially affect the negotiability of notes, and open a door to litigation, by rescinding many contracts.

On the part of the plaintiff it was contended, that the authorities cited were not applicable. The acceptor of a bill is bound to know the hand-writing of the drawer, and if he pays his money on a forged bill, the fault is imputable to him. All the books were ransaked on this subject, in Levy v. Bank of United States, and the decision was grounded on that proposition. The payment to the executor of the forged will was held good, because the probate was had in a court of competent jurisdiction on the subject, which could not be disputed, and therefore was not like the payment under a forged bill or bond; for this was made under the authority of the probate and not of the will. The cases of Fenn v. Harrison, and Fidell v. Clarke, go on the grounds of the goodness and validity of the bills, as referable to the solidity and solvency of the parties, and not to the genuineness of the paper; and the evident distinction between genuine and spurious bills has been already noticed. In Dunlop v. Waugh, the horse was sold according to the pedigree, and the vendor expressly said, he knew nothing further of him, as the mark was out of his mouth. The form of a declaration on an implied warranty, where a sound price has been given for an unsound article, is the same as on an express warranty, to let in both proofs if necessary, and said to have been so practised for twenty years. A fair price implies a warranty, and no one parts with his money without expecting a consideration. 2 Woodes. 415. Doug. 20. It is admitted that this principle comes most frequently into view in the sales of horses, on account of the impositions usually practised in such cases; but it is a general rule, applicable to every species of personal property. If one receives money on a forged note unknowingly, he shall answer for the money; but if done knowingly, it is a publication of the forgery. 12 Mod. 494. It has been said that this book is of no authority; but the doctrine is uncontradicted, and appears consonant to reason. The very shewing of the note here was a misrepresentation, though it is agreed to have been from misapprehension. The rule in *pari delicto* is not referable to the plaintiff; it is chiefly confined to cases of illicit trade, and transactions running counter to the statute law and general national policy; but we know of no instance, independent of these circumstances, where it has been applied to common sales of unprohibited marketable articles. It cannot be the fault; it was

the misfortune of the plaintiff, when he contracted for one thing to have received another. And it is apprehended, that a decision in favor of the plaintiff, so far from injuring the negotiability of notes, would give them an increased circulation; for the purchasers will be rendered secure, whether the change of the objects of sale be designed or accidental.

It was likewise insisted for the defendants, that the circumstances of the pre sent case will not support an action for money had and received. *Moses v. M'Farlane*, 2 Burr. 1005, is not generally understood. There the indorsement was obtained by fraud, and no doubt existed on the true merits. *Id.* 1010, 1012. *Dutrecht v. Melchior*, 2 Dall. 428, is imperfectly reported; but if the vendor had sold only his interest in the land to the vendee without artifice, it would seem there could be no recovery against him. With respect to the failure of the consideration after the agreement is executed, there are some cases in which relief may be had at law, but it is impracticable to extract from the books any general rule on the subject. 1 Fonbla. 363. Nor can we reconcile the rule, that an action will lie on the failure of the consideration of the agreement, with the case cited in 3 Ves. jr. 235, or *Bree v. Holbech* in Doug. 654. The holder of a promissory note is not considered as the assignee of a payee, otherwise all negotiability would be destroyed. An acceptor who has paid a forged bill cannot recover it back. 3 Burr. 1354. 4 Term Rep. 335.

On the other side it was answered, that no case could be put more strong than the present, wherein the consideration of a contract failed. The books are full of authorities, to show, that where money ought not to be retained, or where it had been paid by mistake, or through imposition, or where the consideration failed, it may be recovered back. Among others, see 2 Bla. Rep. 824. 4 Term Rep. 561. 6 Term Rep. 606. Bull. 127. 1 Espin. Rep. 150. 3 Bla. Com. 162. The foundation of the decisions in 3 Ves. jr. 235, and Doug. 654, have already been examined. Written transfers were made, which contained no covenants of warranty.

Lastly, it was alleged by the defendant's counsel that this action was brought prematurely; and that previous thereto, there should have been a tender of the note to the defendants. The special verdict finds that the plaintiff shall restore the note. If a contract is to be rescinded, it must be done in a reasonable time. 1 Term Rep. 133. When an action is brought for money had and received, an immediate return of the article is necessary; but it is otherwise on an express warranty. 1 H. Bla. 19.

The plaintiff's counsel observed hereto, that the opinion of the

court in 2 Burr. 1011, fully justified the commencement of the suit, without making any tender. The agreement is disaffirmed *ab initio*, by bringing this species of action. In one Term Rep. 138, the contract was conditional, and the case in 1 H. Bla. 19, was on an express warranty:

The answers given by the plaintiff's counsel to the arguments adduced on the part of the defendants, are in general, satisfactory to my mind. The leading feature of the case, which early attracted my attention, during the argument, was, in the language of the special verdict, "the note is proved not to be, what it was sold for by the defendants, who were interested therein." I can truly say, with one of the defendant's learned counsel, [Mr. Ingersoll,] that I do not fully see the distinction laid down by Kyd, in his 2d edit., between notes discounted for the accommodation of the transferer, and a general sale by delivery. The author has cited no resolution or dictum, to support this distinction; nor can I find any on a careful search. But if the ground of the difference may be supposed to be, that in the first case, the note is discounted on the credit of the signatures, apparent on the face and back of the note, then the observation applies strongly against the defendants in the principal case, the plaintiff being presumed to have paid his money, in confidence of the truth and genuineness of those appearances.

I impute no criminality of the slightest shade to the defendants. But here the plaintiff has contracted for one thing, and has received another. He may justly exclaim, "*non hæc in fœdera veni.*" It is the vital principle in contracts, that each party shall perform those things which he ought to do. Failing essentially herein, the other party is discharged. The mere exhibition of the note for sale, amounts in my idea, to a representation of facts, which the sellers may be called upon to verify.

The case of *Parkinson v. Lee*, (2 East. 314,) determined in 1802, was cited on the first day of this term, by the defendant's counsel, and much relied upon. There, hops were sold by the sample, for a fair, marketable price, having a latent defect, unknown to the seller, and without fraud on his part, (who did not grow them,) and it was resolved, that seller was not answerable on an implied warranty, though the hops turned out to be unmarketable. The grounds of adjudication were, that the goods were sold according to the usual mode of dealing, where the seller was not the grower of the hops. The buyer had an opportunity of judging by the sample, and if he doubted the goodness, he might secure himself by a warranty. The seller was not liable for a

latent defect, where there was no fault, and no representation made by him, to induce the buyer to purchase the article.

I do not consider that case as analogous to the present. There was a sale by the sample, according to the common course of dealing, between the contracting parties. Here, as I have already observed, the offer of the note for sale was a virtual representation of the genuineness of the instrument; and the jury state expressly, that the "note is not what the defendants sold it for."

To make the two cases parallel, let us suppose the hops to have been sold ignorantly, and without fraud on the part of the vendor, for a fair price; and that instead of really being hops, they were a different product of the earth, similar in appearance, but of inconsiderable or no real value, can we hesitate in saying, that the contract would be rescinded? Would the seller under such circumstances, be allowed to retain the money paid on the contract?

If the doctrine of the defendants is sound, if it is the bounden duty of the buyer of the note by delivery alone, to look to the reality of the subscriptions, and to run the risk of forgeries, the consequence necessarily must be, that if he should purchase a note, whereon all the signatures, as well of the maker as indorsers, are forged, from one who is ignorant thereof, he shall be bound to pay the stipulated price for the waste paper! A doctrine which I cannot bring myself to swallow! The misfortune of the seller ought not, in my opinion, to be visited on the buyer; for that would in truth, be throwing the loss of one innocent man on another!

When it is said by the late Chief Justice in *Musgrave v. Gibbs*, (1 Dall. 217,) that a person who fairly purchases a bond or note, at a discount however great, does not incur the dangers of usury, because he runs the risk of a forgery, I do not take the words to imply, that on such event happening, he may not recur to the seller. Now where it is said in *Cummings v. Lynn*, (1b. 449,) that the assignor of a bond does not, under the covenant implied by the word "assigned," bind himself to be answerable for the recovery of the money, can it be inferred, if the bond should prove to be a forgery, that the assignor should retain the money, if received, or recover it from the assignee, if it remained unpaid, even though the assignor should be wholly ignorant of the foul fact! I should presume, that common sense and common honesty would revolt at either of the propositions. I conceive in the words of Lord Kenyon, (1 Espin. Rep. 448,) that the holder of a bill or note, who denies to indorse them, and sells them by mere delivery,

supposing them to be good, refuses to pledge his credit to their validity or sufficiency; and such I take to be the common understanding of all persons conversant in such transactions. But I also hold, that if such bill or note purports to bear the signature of certain persons, who are responsible therefor, or through whom the buyer must necessarily derive his title, and these signatures are afterwards falsified by the fact, whereby injury or damage arise to the purchaser, the seller becomes answerable therefor. A thing contracted for, and not delivered, will support an action for money had and received. 1 Stra. 407.

On these grounds therefore, I am of opinion that judgment should be entered on this special verdict for the plaintiff.

Smith, Justice. My brother Yeates has gone so minutely into the reasonings of counsel on both sides of the question, and the several cases which were produced during the argument, in support of their different positions, that I am spared the necessity of considering the present subject in detail. I shall therefore content myself with briefly giving the grounds, on which I concur with the Chief Justice and him, in rendering judgment on this special verdict for the plaintiff.

The act of selling chattels is such an affirmation of property, that on that circumstance alone, if the fact should turn out otherwise, the value can be recovered from the seller. 2 Dall. 91. It is constantly understood, that the vender of goods undertakes that the commodity which he sells, is his own. 3 Bla. Com. 164. 1 Fonbla. 109. And it was resolved in 1 Dall. 428, in the case of lands sold, that where no land of the description contained in the deed could be found, an action would lie to recover back the consideration money.

Can there be any solid ground of distinction between the sale of goods of a tangible quality, and mere choses in action, where the vender undertakes to sell what is not his own? I can see no distinction between them in this respect, either in sound law, or common sense, as applied to the common transactions between mankind. Here then the article sold was not the property of the defendants; because when the indorser's name was forged, no property was transferred thereby to the indorsee. 4 T. R. 28. The note "is not what the defendants sold it for," and therefore the money was paid by mistake, and the consideration totally failed. And this brings it within the case of *Moses v. M'Farlane*, 2 Burr. 1012. In 1 Stra. 308, one paid money on a contract for the old stock of a company, and the party gave him so many shares in the additional stock. It was held that an action for money

had and received will lay, because the thing contracted for was not delivered ; but it would have been otherwise, if the thing contracted for, had been delivered, though to a less value.

The defendants moreover can have recourse to Thomas to whom they paid the money, but the plaintiff cannot ; and in my idea, a recovery will tend to prevent similar frauds and promote the circulation of promissory notes.

Brackenridge, Justice. I made up my mind to my satisfaction at the time of the argument, conceiving that from the time I should be on the bench, and that which would be taken up *eundo et redeundo*, I should not have an opportunity, or find it convenient to look into the books, or examine it further. It was in favor of the plaintiff on three grounds.

1. The name of the indorser Morton is a forgery, and the defendants had nothing to dispose of ; no interest, no property. They sold what was nothing.

2d. The plaintiff cannot recover against Thomas, but the defendants may.

3d. It was incumbent on the defendants, and not on the plaintiff to make inquiry after Morton.

Judgment *pro quer. per totam curiam.*

A writ of error was afterwards brought to the High Court of Errors and Appeals, and the judgment reversed on a new ground taken July 1807, that the suit was not maintainable by reason of the note not having been re-delivered, or tendered to the defendant, before bringing the action.

RESPUBLICA *against* ELIZABETH SERGEANT and ESTHER WATERS,
executors of DAVID RITTENHOUSE, esq. deceased.

An account of the state treasurer, examined, approved and settled by the comptroller general, and examined and entered by the register general, and approved of by the Supreme Executive Council, and warrant drawn for the balance, cannot be opened and questioned, after one year has elapsed from the time of settlement, under the act of assembly of 18th February 1785.

APPEAL from the settlement of the accounts of David Rittenhouse, late state treasurer, by the register and comptroller general. It was stated to be an account of interest paid by the treasurer on new loan debt ; a balance was struck therein, as due from the estate of David Rittenhouse, late treasurer, deceased, to the commonwealth,

arising from errors in his statement of new loan debt	
of	£ 10,171 8s. 6½d.
Interest was changed thereon for 10 years;	
4 months	6,306 5s. 8d.

£ 16,477 14s. 2½d.
Dollars, 43,940, 55 cts.

The following note was subjoined to the account :

“Note, interest is charged from 20th December 1790, being the time of general settlement of his accounts, whereon by the examination, which then took place, a balance appeared to be due to him of £ 5438 6s. which was paid to him by a warrant.

Examined and entered,

SAMUEL BRYAN,

Reg. General's Office, 18th April 1804.

Approved and entered,

JOHN DONALDSON,

Compt. General's Office, April 18, 1801.

An issue being formed under the appeal, the cause came on to trial at the sittings on the 2d July last, when the following special verdict was found :

The jury find, that on the 17th December 1790, the accounts of David Rittenhouse as treasurer, were settled by the comptroller and register general. That the settlement was reported to the Supreme Executive Council, and by the council approved, and a warrant drawn in favor of David Rittenhouse for the balance, *prout* the said settlement by the register and comptroller general, the minutes of the Supreme Executive Council and warrant.

The settlement was contained in a small folio book, containing the treasurer's account of debts and credits, and a balance of 5438l. 6s. struck as due to him, and subscribed in the following manner :

Examined, approved and settled the above and foregoing accounts, saving that any further errors which may appear in favor of the state or treasurer may be rectified, and the same may be paid as due.

JOHN NICHOLSON,

Comptroller General, 7th December, 1790.

Examined and entered the above balance, arising from the accounts in this book, including the account of errors stated by the comptroller general, reserving a right of debiting or crediting any further errors, which may be discovered.

JOHN DONALDSON,

Reg. General, Dec. 17, 1790.”

The book in the hand-writing of the treasurer, stated his transactions from the 1st September 1789, until the 9th November following; but the balance struck by him was altered; and there appeared a sheet therein written by the then comptroller general, wherein sundry errors supposed to have arisen from the year 1783 to 1789, inclusively, are stated to have been corrected and rectified by him.

The minutes of the council were as follow:

“In the Supreme Executive Council of Pennsylvania, which met at Philadelphia, on Saturday, December 18th 1790.

The report of the comptroller and register general upon an account of David Rittenhouse, esq. late treasurer of the state, until the November 1789, settled by the register and comptroller general the 17th instant, by which there appears to be due to the said treasurer the sum of 5438*l.* 6*s.*, was read and approved by Council.”

“The Council met, Philadelphia, Monday, December 20, 1790.

The following order was drawn upon the treasurer, to wit: in favor of David Rittenhouse, esq. for the sum of 5438*l.* 6*s.*, being a balance due to him upon his account as late treasurer of the state, until November 1789, as settled by the comptroller and register general on the 17th of this month, according to the comptroller and register general's report.”

“The Jury further find, that in the year 1800 or 1801, certain errors were discovered, which were stated in an account, and that the errors discovered as aforesaid amount to 27,123 dollars and 80 cents. And upon the whole of the above facts, the jury find for the commonwealth the sum of 27,123 dollars and 80 cents damages, with 6 cents costs, subject to the opinion of the court, whether the plaintiff's suit or claim to the said sum was barred by any law or laws of this commonwealth.”

The special verdict was argued this term by Messrs. M'Kean and Lewis for the commonwealth, and by Messrs. Ingersoll, Rawle and Dallas, for the defendants.

On the part of the commonwealth it was contended, that the verdict was partly general and partly special. Facts are stated for the opinion of the court, but they are confined to such as are expressly found.

The defendants' strong hold rests on the 11th section of the act of 18th February 1785, (2 St. Laws 250) which after giving authority to the comptroller general to re-view and re-settle any account by him settled, which shall not be appealed from, and on which no

issue shall have been tried, and to do justice therein to the commonwealth or the party, as the case may be, provides that such error be discovered within one year after the award of the officer, in any case which shall be laid before the Supreme Executive Council, after which time the settlement and award shall not be again opened or questioned, but the party, his heirs, executors or administrators, shall be forever quieted touching the same. The greatest abuses may arise from the construction, which is now set up, as in the case of the county treasurers, where the proper debits are not introduced in their accounts, or improper credits have been allowed to them. The limitation was no doubt made in favor of individuals, but was never intended to sanctify frauds or palpable errors, injurious to the interests of the community, and repugnant to the plainest principles of justice.

It will not be denied, that in an account stated and settled between merchants, if errors shall be afterwards discovered therein, the injured party has his remedy. Nor can it be said, that the commonwealth was meant to be put in a worse situation than individuals in this particular. It is of no moment whether the errors arise from accident or design; they are deemed fraudulent in law. Lord Mansfield says, there may be many cases, where the assertion of a false fact, though unknown to be false to the party making the assertion, will be fraudulent. There may be cases to which fraud will take out of the statute of limitations. Doug. 632 (656.) Our statutes of limitation and the British statute of 21 Jac. are couched in general terms. The latter begins to run only from the time of discovery of a fraud. *Booth v. Booth*, 1 Bro. Parl. Ca. 445. 13 Vin. 542, ca. 3. The statute of limitations is no plea, where the bill charges a fraud; but the bill must charge, that the fraud was discovered within six years before the bill filed. *South Sea Company v. Wymondell*. 3 Wms. 143.

An agreement may be set aside by reason of a mistake in the parties making it, if the point misconceived be the cause of the agreement. Mosel 364. So if a party enter into an agreement respecting a claim, capable of being precisely ascertained, and is ignorant of the precise value of it, but stipulates under an idea and with an intent, that what he is to receive, shall be equal in value to that which he has a claim to, equity will set aside the agreement, if the thing to be received is inadequate to the price of the claim. 1 Vez. 400. 2 Pow. Contr. 196, 197, 198. Fraud or covin may avoid every kind of act. 3 Co. 77. What circumstances and facts amount to such fraud or covin is always a question of law. 1 Burr. 396.

But independent of the great principles of distributive justice, which imperiously demand that plain errors in accounts should be corrected, provided the same be done in a reasonable time after their discovery, the account here was stated on the 17th December 1790, with an express reservation by both of the accounting officers, that any errors either in favor of the state or treasurer, should be rectified thereafter. No law prevents or forbids such reservation; and the treasurer might certainly assent thereto, the benefit thereof being mutual. He must have attended when the settlement was made, for it is idle to speak of an *ex parte* settlement of accounts in such a case. He must have known of the restriction, and that room was left for the correction of errors, when the account received the approbation of council, and he obtained his warrant. It is true, the treasurer was not bound to receive an account stated, with such reservations; but he has acquiesced therein, and it must now be imputed either as his fault, folly or misfortune. If he thought himself subjected to unreasonable hardships, or that the public officers did not discharge the trust reposed in them, he had his remedy either by mandamus or impeachment.

The committee appointed to examine the accounts and official transactions of John Nicholson the comptroller general, did not make their report until the 9th January 1794, (Hog. St. Tri. 111) and then for the first time it was discovered, that the state treasurers had been credited by a sum of 11,598*l.* 9*s.* 9*d.* over and above the sums which from the indorsements on the certificates appeared to have been paid; but that it would require a very long examination and a comparison of the indorsements on each certificate with the corresponding payments at the treasury, before it would be possible to discover exactly, where the mistake or the fault lies. *Ib.* 125. It is true, the amount of the new loan debt was known, and the four years interest thereon might be readily ascertained: but the treasurer was not entitled to credit on the amount thereof, until it appeared to have been paid.

In December 1795, the balance due from the state treasurer, was considered as part of the funds of the state; and on the 4th April 1798, the legislature appropriated \$1541, for the payment of clerks to be employed in the office of the comptroller general, in settling the accounts of the late comptroller general and state treasurers. 4 St. Laws, 268. And on the 11th April 1799, the further sum of \$1500, for the same purposes. *Ib.* 488. These acts show the sense of the government, and do not impair former contracts.

But is also contended, that what was done in 1790, was no legit-

imate settlement, so as to operate as a bar. The act of 18th February 1785, (2 St. Laws, 247,) refers to the act for methodizing the department of accounts, by the appointment of a comptroller general, passed 14th April 1782, (*Ib.* 44,) under the 1st section whereof, the public accounts were to be audited, liquidated and adjusted by the comptroller general; and under § 2, the accounts when settled, were to be transmitted with the vouchers to the president and council, who were to be satisfied with the justice of the settlement. The act of February 1785, in § 3, gave the dissatisfied party the liberty of an appeal; and by § 5, the executive might direct a suit in the name of the commonwealth.

By the act of 28th March 1789, (2 St. Laws, 704,) a register general was to be appointed. By § 3, the comptroller general shall submit all accounts, which he shall thereafter adjust, before he shall finally settle the same, to the inspection and examination of the register general, and shall take his advice and assistance in making such settlements, which shall be laid before the Supreme Executive Council. By § 4, the register shall keep proper books and transfer the balances, at the time of passing this act, and where the accounts cannot be finally settled, so much as can be settled, &c.

Under the act of 1st April 1790, (*Ib.* 787,) § 4, all accounts thereafter made by individuals or bodies politic, and all accounts thereafter to be opened between this state and such bodies politic or individuals, shall in the first instance be submitted to, examined, liquidated and adjusted, by the register general; and he shall after liquidation and adjustment, transmit the same to the comptroller general, for his examination and approbation, with the vouchers and evidence; who shall in like manner transmit the same to the president and council for their final approbation.

By construing the introductory and enacting words of this section together, it is apprehended that the legality of this settlement must be judged of by that act. It does not appear, that the register general did in the first instance, examine, liquidate and adjust this account; and unless the requisites of the law have been pursued, the bar does not arise, though a warrant afterwards issued, which forms part of our complaint. This suit is not brought on the settlement, but for money had and received, though it originates on the appeal from the settlement in 1801. It was incumbent on the defendants to have satisfied the jury, that the register general has examined the vouchers, and liquidated and adjusted the balance; but this has not been done. The jury have submitted the legality of the settlement to the court, who will form their decision thereon,

from the words of the law as written, and not on the report of the accounting officers to the house of representatives in 1800, or at any other period.

Moreover, the settlement of 1790, does not include the sum in dispute. The register general has only examined and entered the above balance, arising from the accounts in this book, &c. The book only contains the official transactions of the treasurer, from the 1st September to the 9th November 1789, but not those of the year 1786, when the error arose from a double charge of payments. The register does not appear to have examined all the accounts, but has judged from the sums exhibited to him. He does not undertake to say, the balance is justly due, but under the 4th section of the law of 28th March 1789, he makes a partial settlement, where a final one could not be made. To construe this as a final settlement, will do manifest violence to the plain meaning of the department of accounts. The jury here have done, what it was the duty of the accounting officers to have done.

It has been intimated, that great inconveniences will arise from extending the liens as to the estates of public officers. But it will be remembered, that the lien only goes as to the sum found due on settlement, and therefore no injurious consequences can possibly ensue therefrom.

Mr. Lewis suggested, during the argument, his doubts that John Donaldson, esq. was not the regular officer which the law required on the 20th December 1790, the schedule to the constitution having made no provision in the 2d and 3d sections thereof, for the continuance of persons in office, who had been appointed by legislative authority. The third Tuesday of December happened on the 21st December 1790. But he relinquished the point, and the same was not spoken to.

The counsel for the defendants lamented the hardship of their client's case, in having tried the cause at so late a day. It appeared from the Journals of the house of assembly, that Mr. Rittenhouse resigned his office as state treasurer on the 9th November 1789, and rendered his accounts the same year.

The facts were notorious, that he died on the 26th June 1796 (about eleven years and four months after the passing of the act of 18th February 1785.) His wife, who did much of the business of his office, died in 1798, and John Nicholson died in a state of derangement in 1801. Consequently there was no one, who could give any information as to what passed at the settlement in 1790, except Mr. Donaldson. A small book too, containing an account of rectified errors, was missing at the trial, and—[the court directed them

to confine themselves to the facts set out in the special verdict.] The cases cited on the part of the commonwealth, are not applicable to the questions before the court. Booth v. Booth, and South Sea Company v. Wymondsell, were cases of gross fraud. The court in judging a special verdict will not infer fraud not found therein. The error is supposed to arise from mistake in casting up the accounts. But fraud and error are distinct in their nature. Mitford 208, 212. The expressions of Lord Mansfield in Doug. 632, (756) to the extent they have been carried, as referable to this transaction, produce this notable effect, that notwithstanding the strong marked words of the proviso in the 11th section of the act of 18th February 1785, a public account shall never be said to be closed, if it is suggested, that there has been an assertion of a false fact therein, which is denominated fraudulent. And thus every public account may be overhauled and re-examined at any indefinite period after the death of the party and his witnesses, though in the plainest terms a *quietus* has become the irrevocable grant of the legislature, when one year has elapsed after a final settlement by the department of accounts. No features of an agreement exist in the present case. Accounts stated between merchants, are not within the provision of the statute of limitations, *aliter* of accounts current. 15 Vin. 119, pl. 3, 110 pl. 4, 5. 2 Saund. 137. Vent. 91. 1 Mod. 70. 2 Mod. 312. The statute of limitations says nothing of bills in equity, but these are construed to be within it, 2 Equ. Ca. Abr. 579. Ca. 9. 2 Com. Dig. 261, (last ed.) though in cases of misrepresentation.

It was the policy of the law of February 1785, consulting equally the interests of the community and of individuals, that public accounts should be finally closed. The reservation of future errors cannot be binding on the treasurer, unless he freely and fully assented thereto. But he has done no act to validate this restriction. The settlement when completed, went up as a matter of course to the Supreme Executive Council for their approbation. It was a mere official report, an *ex parte* act of the accounting officers, repugnant to the words and meaning of the law. It lay on the commonwealth to show that the treasurer knew of the manner in which the accounts were subscribed. The year allowed by the act of 18th February 1785, can only refer to latent errors. While the account remained in the hands of the register and comptroller general, it might be said with some plausible reason, that the reservation would apply; but it can have no such effect, after the settlement had been transmitted to council.

It has been urged, that the settlement in 1790, was not legitimate, and therefore no bar; and that it must be governed by the words of the act of 1st April 1790. To this it is answered, that the law of 1790, only applies to accounts thereafter made or thereafter to be opened between the state and bodies politic or individuals; and consequently, it cannot refer to this account, which was exhibited in November 1789. But supposing the case to be otherwise, the words examined, approved, settled and entered, imply essentially examination of vouchers, liquidation and adjustment. The register general liquidated and adjusted the account in fact, and in one instance charged the treasurer with 444*l.* 11*s.* 10*d.*

The extent of the settlement appears to be the great question; and it is presumed, that it possesses every ingredient of a full and final settlement.

Mr. Rittenhouse did all in his power. He surrendered up all his books, vouchers and accounts. Within 18 months after his settlement, a balance sheet was made out by Mr. Donaldson, of all the years of his treasurership. He is debited with the balances of the several years in the books of the register general, and No. 4, in the account, on which the appeal is founded, comprehends the accounts of the year 1786, and all the errors found therein. The accounts of each year are kept separate, and the balances are transferred to other books. In the nature of the thing, the errors could not possibly be ascertained, unless all the accounts were examined. Both of the officers in the account sued for, stated 18th April 1801, call the transaction in 1790 a general settlement, and there is no essential difference in the subscriptions to the two accounts. Unless therefore the settlement of 1790 is supposed to be a final one, there could be no legal appeal from the account settled in 1801. The orders in council on the 18th and 20th December 1790, reserve no error, but state the account as settled. The power of drawing warrants only exists on a final settlement being made, under the 2d section of the act of 13th April 1782. And the 21st section of the 1st article of the state constitution declares, that money shall not be drawn out of the treasury, but in consequence of appropriations made by law.

The two laws of the 4th April 1798 and 11th April 1799, can have no effect on the decision of this question. Though they may show the sense of the legislature, yet if the settlement of 1790 operated as a discharge to the treasurer by virtue of the act of 18th February 1785, and he was quieted thereby, subsequent legislatures could have no power to impair the former contract. Those acts

will be controlled by the constitution, and remain *sub graviori lege*.

We will only subjoin, that if in truth, error has crept into the accounts of Mr. Rittenhouse, the community may console themselves that it has operated to the compensation of a man, who possessed the most splendid talents, and was an ornament to his country.

Shippen, Chief Justice. The jury find that David Rittenhouse's accounts as treasurer of the commonwealth, were settled on the 17th December 1790, by the comptroller and register general, which settlement was reported to the Supreme Executive Council, and by them approved, and a warrant drawn in his favor for the balance. The jury further find, that in the year 1800, or 1801, certain errors were discovered in the treasurer's account to the amount of \$27,123, and 80c ents, which sum they find due to the commonwealth, subject to the opinion of the court, whether the claim of the commonwealth to that sum was barred by any law or laws of the state.

By the act of 18th February 1785, the comptroller general is authorized to settle all accounts between the commonwealth and the public officers and others, and if he discover any sums of money unaccounted for to the state, to correct former settlements and rectify mistakes; provided such error be discovered within one year after the award of the comptroller, in any case which shall be laid before the Supreme Executive Council, after which time, the settlements and awards aforesaid shall not be again opened or questioned, but the party his heirs, executors and administrators, shall be forever quieted touching the same.

By a subsequent act of 1st April 1790, the register general is associated with the comptroller. The former is directed to examine, liquidate and adjust, and the comptroller is to examine and approve and the Supreme Executive Council are to approve. This however only respects such demands, as shall thereafter be made, and accounts thereafter to be opened between the state and individuals; as to former demands and accounts exhibited before the passing of this act, and accounts opened and exhibited before they were left under the former law to be examined, approved and settled by the comptroller, and examined and entered by the register. This is precisely the form, in which the accounts of David Rittenhouse were settled; and being approved by the Supreme Executive Council, there is a positive bar as to any further demands, arising from a discovery of errors after one year. It may not be consistent with justice and equity, that a palpable error discovered many years after

should not be accounted for. But the imperious directions of the law must be obeyed ; and we are compelled to say by express words, the state is barred from recovering this money after such a length of time.

Yeates. J. The great question on which the determination of this case must turn is, was the settlement made by the comptroller and register general a final settlement, within the true meaning of the act of 18th February 1785? For whatever our sense of natural justice may be, or however strongly our personal feelings as honest men, may lead us to rectify plain errors in matters of a pecuniary nature, when discovered, we are bound by the imperious words of the law to declare, that a final settlement, approved of by the Supreme Executive Council, cannot "be opened or questioned after one year, but the party, his heirs, executors and administrators, shall be forever quieted concerning the same."

It has been objected on the part of the commonwealth that the account has been passed, with a special exception of errors by both of the accounting officers, and therefore, a re-examination of the account may be gone into, under the plain words of reservation. This might have been the case, if the treasurer had also subscribed it, or clear proof had been given that he had assented to the exception, provided that it had been done within a reasonable time. The treasurer might have waived the clause in the law, which was founded on principals of public policy, operating to his benefit. But of this we have no evidence. The public officers also might have refused to complete a settlement, until a more thorough examination had been had, or the new loan certificates had been brought in.

It is also said, that the subscriptions of the comptroller and register general show by clear words, that the accounts of 1786 (the year wherein the errors took place) were not taken into consideration. The former officer states the account "examined, approved, and settled the above and foregoing accounts, saving that any further error," &c. The latter states, examined and entered the above balance, arising from the accounts in this book, including the account of errors stated by the comptroller general, reserving, &c. The book on the face of it, contains the transactions from the 1st September 1789, until the 9th November following. But the jury having referred to the settlement in the book, make it a part of their special verdict; and it appears thereby, that errors from the year 1788 to 1789 inclusive, were corrected therein. Consequently,

there necessarily must have been an examination of the accounts of those years by the accounting officers.

But it is further objected, that the act of 1st April 1790, prescribes the mode of settlement; and unless the account has been examined, liquidated, and adjusted by the register general in the first instance, and afterwards examined and approved of by the comptroller general, and finally approved of by the Supreme Executive Council, it is no legal or valid settlement binding on the commonwealth.

It appears by the 4th section of that act, that it is confined to demands hereafter made by individuals or bodies politic, and to accounts hereafter to be opened between this state and such bodies politic or individuals." Consequently, this account including demands prior to the passing of the act, and accounts opened and exhibited before the law had existence, as appears by the Journals of the assembly, is not embraced thereby; but the act of 28th March 1789, is solely applicable thereto. The comptroller general is directed by the 3d section of that act, "to submit all accounts which he shall hereafter adjust, before he shall finally settle the same, to the inspection and examination of the register general, and shall take his advice and assistance in making such settlements, which shall be laid before the Supreme Executive Council."

It appears moreover, that the mode of signature of the last final settlement of the account in question, on which the appeal is founded, is examined and entered by the register general, and approved and entered by the comptroller general. The first agrees with the present account; the second in the present account, is examined, approved, and settled, which are highly comprehensive terms.

The question recurs, is this account then a final settlement?

In the special verdict it is stated, that "the accounts of David Rittenhouse as treasurer, were settled by the comptroller and register general; that the settlement was reported to the Supreme Executive Council, and by the council approved, and a warrant drawn in favor of David Rittenhouse for the balance, *prout* the said settlement by the register and, comptroller general, the minutes of the Supreme Executive Council and warrant."

In the words of the comptroller general, it is said to be "examined, approved and settled," and of the register general, to be "examined and entered." In the account of 1801, signed by both of the accounting officers, it is called a "general settlement of his accounts." In the minutes of council of 18th November 1790, it is said to have been "settled" by the register and comptroller general,

and a balance of 5438*l*. 6*s*. found to the treasurer, and "approved of" by council, who in two days thereafter issued a warrant to him for the balance due to him upon his account, as late treasurer of the state until November 1789, as "settled by the comptroller and register general on the 17th instant.

With such proofs before us we are compelled to say in the words of the department of accounts, that it was "a general settlement;" and though errors may have arisen therein in the treasurer's statement of payments of new loan debt, it cannot at this distance of time be "again opened or questioned, but the defendants, executors of the former treasurer, must be forever quieted touching the same.

Smith J. The fundamental question in this case, upon the solution of which the judgment we must give will depend, is, whether the acts done by the comptroller general, the register general, and the Supreme Executive Council in December 1790, on the accounts of David Rittenhouse, then late treasurer of this commonwealth, amount to a final settlement of them, or not, agreeably to the true intent and meaning of the several acts of assembly on the subject?

That these officers and the Supreme Executive Council, considered the settlement as final, but subject to the reservation, seems clear beyond a doubt. It was at one period of the argument, contended, that at the time those acts were done, the powers of the comptroller and register general were extinct. The court at once, and I believe unanimously, were of opinion, that there was no foundation for that objection; and the counsel who made it, gave it up candidly, upon re-consideration.

But it is contended, that the accounts not being exhibited before the 28th March 1789, they were in the first instance to be submitted to, examined, liquidated and adjusted by the register general, examined and approved by the comptroller general, who should transmit such account to the Supreme Executive Council for their final approbation; and that this account not having been so acted upon, it was not intended by the officers, that it should be a final settlement.

The first impression of this part of the argument, had great weight on my mind. Indeed were it the true construction of the 4th section of the act of 1st April 1790, (2 St. Laws, 789,) I would be compelled to deem it fatal to the bar set up on the part of the defendants; because I perfectly agree with the counsel who spoke last, on the part of the commonwealth, "that when a rule of law is relied on, to bar a right, it is incumbent on the party who

would avail himself of it, to bring himself strictly within it." But on examining that act, I find that this is not the construction of it. It declares, "that it is expedient to enable the comptroller general to state the account between this state and the United States, and to settle and adjust to the 28th March 1789, (the day on which the receiver general was appointed,) all accounts between this state and individuals, or bodies politic, (other than the United States,) and to report to the register general all such balances as were then due to or from any individuals or bodies politic for the purpose directed by the act of 28th March 1789, and the supplement of 30th September 1789." There is an ambiguity in the rest of the preamble to this 4th section; but the accounts between the 28th March 1789 and the 1st April 1790, must of course be settled according to the directions of the act of 28th March 1789, and the supplement of 30th September 1789; because the act of 1st April 1790, directs, that "all demands thereafter made, &c. shall in the first instance be submitted to, examined, liquidated and adjusted by the receiver general." Therefore he had no authority to examine, liquidate and adjust in the first instance, any accounts before exhibited.

Even did it not appear by the receipt of the comptroller stated in the argument, that the accounts of David Rittenhouse, were exhibited before passing the act of 1st April 1790, were it doubtful, yet as every officer, intrusted with the execution of a public duty, is presumed to execute it properly till the contrary appears, (2 Bla. Rep. 853, 2 Burr. 1073,) and as the account is settled agreeably to the directions of the preceding acts, it would be presumed, that the account was exhibited, before the act of 1st April 1790. David Rittenhouse having voluntarily resigned his office in the preceding November, would strengthen this presumption; therefore, the accounts are finally settled according to the existing law, subject to correction within the year, unless the reservation gave a longer time for correction. No longer time could be given, without an express mutual agreement. We have no evidence that there was an agreement to extend the time for correction beyond the year. It is true, that it was not necessary to make the reservation, because the law gave it; and it is equally true, that if it might be extended beyond the year, it might be extended to one hundred years. Every agreement must be certain, as to the subject matter of it; if entirely uncertain it is void. This alleged agreement is unlimited as to time, and therefore it is of no effect. I take it for granted, that it was inserted merely out of abundant caution. It cannot control an express law. It were easy to point out the evil conse

quences of the construction, contended for on the part of the state; but where the rules of law are clear consequences are out of the question.

Upon the whole therefore, I am of opinion, that this was a final settlement within the true intent and meaning of the acts of assembly, no errors being discovered and corrected within the year. And by the act of 18th February 1785, (2 St. Laws, 251,) § 11, it is provided, that "such error be discovered within one year, &c. from and after the award of the said officer, in any case which shall be laid before the Supreme Executive Council, after which time the settlements shall not be again opened or questioned, but the party, his heirs, executors or administrators shall be forever quieted touching the same."

I am compelled therefore to declare, that the commonwealth is barred from recovering the sum of 27,123 dollars and 80 cents found by the jury for the commonwealth, against the defendants.

Brackenridge, J. The settlement in this case was general. It embraced every item of debt or credit. The error lay in the addition; but all was in view.

The settlement was by officers having authority to settle; and the settlement was according to law.

It was a final settlement. It was acted upon as such, in drawing a warrant for the balance.

The saving tacked to the settlement, could have no operation, but concurrent and co-extensive with the act of limitation and the reservation therein provided; unless it did necessarily or presumptively follow, that the deceased was a party to the saving, and had given his assent to farther extent. But the saving was superfluous and inofficial. It was on one side; for *ex officio*, the report was made by the act of assembly and the course of the office, immediately to the council, and not delivered to the treasurer.

There was no fraud. It was not the representation of a fact falsely, knowing it to be false, or not knowing whether it was or not, but undertaking to know; for this would constitute a fraud. It was an error and not a fraud.

There is therefore nothing to take the case out of the statute; and even against the deceased in his life-time, the action in law would have been barred.

On such a settlement, after such a lapse of time, and the death of the party, his mouth closed and no explanation to be given, I do not know, but that equity would have said, that the account shall

not be considered as open ; and that, independent of the act, there should be a bar. As it is, there can be no doubt.

My opinion is in favor of the defendants.

Judgment for the defendants.

This judgment was afterwards affirmed in the High Court of Errors and Appeals, July 25, 1807.

DANIEL DE BENNEVILLE *against* GEORGE DE BENNEVILLE.

Where it is objected, that witnesses have been summoned unnecessarily to swell a bill of costs, court will interfere only in cases of manifest oppression.

THIS was an action of trespass for mesne profits, wherein the plaintiff recovered \$200 damages.

An appeal was made from the prothonotary's taxation of costs, on the ground that a number of unnecessary witnesses had been subpoenaed by the plaintiff, some of whom were material for the defendant, and had been called by him, while others had not been examined in the cause ; and that in the case of one witness in particular, an attachment had been taken out for him, though the plaintiff had been informed he was infirm and unable to attend, and being brought a certain distance on the road, the carriage had broke down, so that he could not attend the court ; yet the costs of the attachment and service thereof had been taxed against the defendant.

By the court. No general rule can be laid down on the subject with safety to the suitors and the general practice. A party must come armed at all points. He cannot know what matters will be conceded by his adversary, nor what all his witnesses will testify. The necessity of calling a witness is often superseded by what passes in court, of which it is impossible to form any judgment beforehand. One thing is certain, that the expenses of witnesses always exceed their legal allowance, which the party summoning them is generally obliged to pay. In the case of the witness, whose appearance was attempted to be enforced by the attachment, it would be absurd to suppose, that the plaintiff went to the expense of procuring a carriage for him, merely that the defendant should be subjected to pay his legal fees. Such measures carry with them their own antidote. In question like the present, manifest oppression must be shown to justify the interposition of the court, and they

will readily interfere in such instances. But a design to oppress will never be presumed.

Appeal dismissed.

Messrs. Ingersoll and Dickerson, *pro quer.*

Messrs. Rawle and Wells, *pro def.*

LEWIS WOLFF *against* JOSEPH TURNER.

Where a defendant removed a cause after it has been at issue two terms, the exception must be taken when the writ is put in, or by motion for *procedendo* before trial.

Where a defendant removes a cause, he is not liable to costs, if the plaintiff becomes nonsuit.

Suit for marrying an apprentice who was a minor, without the master's consent. The plaintiff was nonsuit on the trial.

Mr. Wells for the plaintiff moved, that the costs of the Court of Common Pleas only should be taxed against his client. A declaration had been filed, and the cause put to issue two terms in Philadelphia county, before the defendant removed it by *habeas corpus*, which was contrary to the 7th section of the act of 25th September 1786. 2 St. Laws 473. This cause is not within the provision of the act of February 28th, 1787. *Ib.* 490. Moreover, the plaintiff not having recovered 50%, the defendant, on his removal of the action, is liable to pay double costs under the 3d section of the act of 20th May 1767. 1 St. Laws 480. He also cited 1 H. Bla. 10.

The court stopped Mr. M. Levy, who was proceeding to repel the motion. It is immaterial now after trial who removed the cause, or when. The objection should have been taken at the time of the writ put in, according to the act of 1786, or at least a *procedendo* should have been moved for in this court before trial.

The law of 1767, does not provide for this case, Under that act a defendant pays double costs, where a defendant removes a cause wherein the debt or damages recovered shall not amount to the sum of 50%. But here the plaintiff recovered nothing. He had no cause of action and became nonsuit.

Motion denied.

President and Directors of the Bank of Pennsylvania against ANDREW HADFEG, PETER REGNIER and SAMUEL SALTER.

A dormant partner engaged in a limited concern, and not in the general partnership of the house, for whose use a note was discounted, and afterwards protested, discharged on common bail, and the testimony of one of the partners, a bankrupt, was received by the court, to establish the facts.

MOTION to discharge Samuel Salter on common bail. He had been arrested on a note drawn by one Cottineau, payable to Hadfeg and Co. or order, for \$1450, which had been indorsed by them and discounted at the bank.

Salter was said to be a dormant partner of the house, and in proof thereof, a bill of sundry looking glasses sold by Hadfeg and Co. to James Stakes, on the day preceding the date of the note, amounting to \$111²⁷/₁₀₀, was produced by the plaintiffs, with a receipt thereon by S. Salter, and a subscription by him in these words: "It is fully understood, that S. Salter is one of the firm of Hadfeg. For partners and self. S. Salter."

To show that this was a mere limited partnership, confined to looking glasses, and did not respect the general partnership of Hadfeg and Co., Peter Regnier, one of the defendants, was offered as a witness. He was a bankrupt and had obtained his certificate. Hadfeg had not been arrested.

The plaintiffs excepted to his being sworn, on the ground of his being immediately interested in the event of the suit, and cited 5 Ves. jr. 792, Wright v. Hunter.

Sed per cur. In these summary inquiries by the court, parties though interested have always been received. Many instances of the practice have occurred in this court.

He was sworn accordingly; and it appearing by him and two other witnesses, that Salter was not interested in the general concerns of the house of Hadfeg and Co. for the accommodation whereof this note had been discounted, he was discharged on common bail.

Mr. Ingersoll, *pro quer.*

Messrs. Levy, Dallas and Dickerson, *pro def.*

JOHN KEEN, for the use of the Carpenter's Company of Philadelphia
against MARTHA SWAINE, administrator of EBENEZER SWAINE, and
JOHN M'CRAWLEY, assignee of GEORGE M'CRAWLEY.

A sale by a sheriff on a *levari facias* on a second mortgage, free of all incumbrances, confirmed under the special circumstances of the case.

Q^u. Whether a sale under a subsequent mortgage or judgment, can affect the security of prior mortgagee or judgments?

Levari facias sur mortgage returnable this term, on which a sale of the mortgaged premises was had by the sheriff on the 30th July 1803.

A motion was made by Mr. Levy to set aside the sale, on the affidavit of James Swaine, stating that a sale had been made by the sheriff on a prior mortgage to Matthew Vandeußen, on the 3d June 1801, of the two houses mortgaged, when he, the said James purchased the easternmost house, free of ground rent, for \$1800, and Martha Swaine the westernmost house, subject to a yearly ground rent of \$30, for \$1730; that the first mortgage agreed to let the principal of his mortgage lay if the interest was paid up, and he the said James, in expectation of getting a deed from the sheriff, paid him sundry sums of money, which inclusive of the interest paid to the first mortgagee up to the 25th July 1803, amounted to \$1114²⁵/₁₀₀; that he and said Vandeußen had informed the sheriff of their agreement, but that the carpenter's company having bought in the second mortgage from John Keen, proceeded to sell the premises by the sheriff on the 30th July 1803, on the same mortgage; and that the said sheriff then sold the premises clear of all incumbrances to the highest bidder, thereby rendering it necessary for the purchaser to advance a much larger sum in ready money than he ought, and occasioning a great sacrifice of the property, the easternmost house being sold for \$1450, and the westernmost house for \$1190, and that the said sheriff had no authority from Vandeußen to sell the premises in that way, particularly as the defendant had shortly before, viz: on 18th July 1803, (about 12 days before the last sale,) paid to the said Vandeußen \$30⁴⁴/₁₀₀ on account of the interest on his mortgage.

Matthew Vandeußen, the mortgagee, was also examined. He swore, that on the 3d June 1801, he agreed to wait for his principal for one year, with James Swaine aforesaid, on receiving of his interest, and informed the sheriff thereof accordingly; that he has received his interest up to 25th July 1803, and that in the same month the sub-sheriff inquired of him whether he wanted his money, to which he answered in the affirmative; and the sub-sheriff observed thereupon, if he did not

want his money, he must go to the sheriff and declare so under his hand, and the witness replied he would not do that.

Mr. Levy contended, that if the last sale was set aside the delay would be inconsiderable. It was clear on general principles, that a mortgagor could not affect the first mortgagee, by any subsequent incumbrances. The latter has the legal estate vested in him, subject to the equity of redemption in the mortgagor.

Smith, J. I know not the meaning of those words, as applied to mortgages in Pennsylvania, where they are mere securities for the payment of money. On default of payment, remedy is to be had by suing out a *scire facias*, and not as in England, by a bill to foreclose the equity of redemption.

Mr. Levy. And yet amongst us, an ejectment may be supported on a mortgage, and a late case of this kind occurred at Nisi Prius in this city. I have understood that it was determined in this court, that a sale under a second mortgage could not affect the first Febiger's lessee *v.* Craighead, March term 1769.

Yeates, J. The question was then fully debated, but no adjudication given on the general principle, the judges having disagreed in opinion thereon. The resolution was grounded on the loan office act, and the court guardedly so expressed themselves.

Mr. Levy. The practice of selling lands under later judgments is replete with inconveniences. The prior incumbrancers rely on the good of their security, and have frequently no notice of the sale. Added hereto, the sheriff gets poundage on the whole sum, which is injurious as well to debtors as creditors. If he sells under subsequent judgments, he should sell subject to prior incumbrances, and then no injury is done. Besides all sheriffs are not equally worthy of trust, and the security which they give is ill proportioned to the money which passes through their hands. It is obvious that the sheriff here depreciated the property by selling the whole for ready money, when Vandeußen did not require his principal. He had no power to sell the houses, freed of the first mortgage, unless by the express authority of Vandeußen; and the latter so far from empowering him to do so, actually received the interest up to the 25th July, a few days before the second sale, under his agreement with the

first purchaser. The sale therefore has been without authority.

Mr. F. Sergeant in behalf of the sale, urged that no general rule could be laid down in such cases. A mortgagee here has a lien on the mortgaged premises in the same manner that a judgment creditor has a lien on all the lands of his debtor. Both are securities for the payment of money, and no more; and though a mortgagee to some purposes may be considered as having the legal title in him, so as to recover in ejectment, yet on such recovery he shall only hold the lands until his principal and interest is paid. It will not be said that the mortgagor is so far divested of the legal interest that he may not maintain an ejectment against a stranger. Lands in this state in defect of personal estate, are made chattels for the payments of debts, and prior incumbrancers can no more prevent a sale of lands under subsequent judgments, than prior execution creditors can prevent a sale of goods levied on by the later creditors, discharged of their lien, in England. The money arising from the sales will be applied according to the priority of claims in both instances. But admitting that mortgages here are to be considered in a stronger point of view than mere securities, it only results, that the purchaser and not the prior mortgagee runs the risk of a sale on a second mortgage. And if the money produced by the sale will satisfy the first incumbrancer, the purchaser may secure himself by looking to the appropriation of his money. It is certain, that the mortgagor may redeem, and the same right becomes vested in the sheriff's vendee. Every one thus obtains his right.

James Swaine has no reason to complain. If the terms of sale had been different at the second sale from the first, he might have some grounds of complaint; but this was cautiously guarded against, and the purchaser were placed on the same footing. Vandusen agreed to wait one year for his money; his agreement to wait longer is barely constructive, and his construction is repelled by his conversation with the under-sheriff. He wanted his money, and would not give it under his hand to the sheriff that he would wait longer.

The court denied the motion to set aside the sale, under the special circumstances of the case, but declined giving any determination on the principle controverted.

The Chief Justice subjoined. It may be attended with dangerous consequences, if the security of a prior mortgage could be impaired by

later incumbrances. A sheriff may be unworthy of trust, and his security inadequate.

Brackenridge, Justice. I have always thought that no subsequent judgment could have any effect by a sale, injurious to prior judgments.

Yeates, Justice. On the other hand, there are dangers, that the lands sold subject to prior mortgages or judgments, will not bring their full value. Judgments may be entered by way of security. Payments may be set up by the debtor, and controverted by the creditor. How can the sheriff ascertain in such cases the amount of prior incumbrances or persons desirous of purchasing become acquainted therewith? No one can tell what the purchase money will amount to, and the result will be injurious to creditors, debtors and purchasers. What sticks with me is, that mortgages and judgments are mere securities for the payment of money. At the same time, I admit, that injustice may be done, by selling lands subject to prior incumbrances, without giving full notice to such creditor. But this difficulty might I think, be obviated by the court.

Smith Justice. There are great dangers and mischiefs on both sides of the question ; and it will require great consideration before the court can lay down any general rule on the subject.

EDWARD WILLIAMS and JAMES WORRAL executors of JAMES FISHER
against BENJAMIN PASCHALL, HENRY PASCHALL and ANN PAS-
CHALL, heirs of JONATHAN PASCHALL.

An award must be certain and final. But a general plea thereto charging mistake in the arbitrators, without stating the particulars, is bad. Court where it is in their power, will correct a plain mistake of arbitrators or referees.

DEBT on arbitration bond, in the penalty of 500l. dated 14th September 1796.

The defendants crave oyer of the bond and condition, and also the award, which are read to them, and agreed to be considered as spread upon the record.

The bond was in the common form ; conditioned for the performance of the award of Philip Price, John Pearson and Samuel Gibson, or any two of them ; of and concerning all matters in controversy between them, respecting a certain bond given by the said Jonathan Paschall to the said James Fisher, and respecting all accounts which

they the said heirs of the said Johnathan Paschall may exhibit as payment in discharge of the said bond, &c. So as the said award should be made in writing indented under the hands and seals of the said arbitrators, or any two of them, and ready to be delivered to the said parties on or before the 14th day of March then next ensuing.

The award was as follows :

“ Whereas it hath been referred to us the undersigned to consider sundry matters in dispute between the within named parties, as by the within bonds of submission will appear ; and we having heard the parties and fully considered their accounts exhibited to us, are of opinion that Benjamin Paschall, Henry Paschall and Ann Paschall are justly indebted to Edward Williams and James Worrall, executors of James Fisher, in the sum of 810l. 11s. 4½d.

Witness our hands and seals March 11, Anno Domini 1797.

Philip Price, (LS.) Jonathan Pearson, (LS.) Samuel Gibson, (LS.)”

Which being read and heard, the said Benjamin, Henry and Ann by William Lewis, their attorney, say, that the said Edward and James ought not to have and maintain their action aforesaid thereof against them ; because they say, that the said arbitrators in making the said award at the time and place aforesaid from a mere inadvertency, error, mistake and misapprehension of the law and right, and justice of the case, calculated, allowed and added the full interest of 6 per cent per annum on the whole amount of the principal sum mentioned in the bond submitted to their arbitrament for a long time, that is to say, for twenty six years and upwards, although within the same time many large payments and advances had been made by these defendants, and on their accounts to the said James Fisher in his life-time, and after his decease to the said Edward and James for and on account of the said bond to the full amount of the principal and interest due on the said bond, but on which payments and advances from a mere mistake, error, and misapprehension of the law and right and justice of the case, no interest was calculated or allowed by the said arbitrators in making and forming their said award, nor were the said payments and advances deducted as of law and of right they ought to have been from the moneys due on the said bond, at the respective times when such payments and advances were made, or at any time or times before the making and publishing the said award ; and this the said Benjamin, Henry and Ann are ready to verify. Whereupon they pray judgment

if the said Edward and James ought to have or maintain their action aforesaid against them the said Benjamin, Henry and Ann.

W. Lewis.

The plaintiffs demur to the plea.

The defendants join in demurrer.

The questions before the court were, whether the award was good in truth ; and if it is, whether the plea is good.

Mr. E. Tilghman for the plaintiffs. The arbitrators recite the bonds of submission in their award, and have taken on themselves the trouble of deciding on the matters submitted to them. The award relates to the submission, and therefore necessarily is *de et super premissis*. The obligation to the testator, concerning which the controversy arose, was conditioned for the payment of 300l. to the testator, and dated 21st November 1771. The award is for 10l. 11s. 4½d. more than the principal sum, and supposing there had been no payments deducted, the interest would when the arbitrament was made, have amounted to 455l. 11s. The accounts exhibited to the arbitrators must have been by the defendants, the heirs of Jonathan Paschall, according to the terms of the submission. Awards are now considered with greater latitude and less strictness than they were formerly ; but they must be certain and final. 1 Burr. 277. Both these properties, the present award possesses. It is not now necessary, that an award of money to be paid in favor of one of the parties, should express it to be in satisfaction, or should contain any equivalent terms ; it shall be so intended. 1 Bac. Ab. 224, (last ed.) Awards of late are construed with great latitude, and according to their intention apparent on all the words. 1 Dall. 174.

Our objection to the plea arises from its generality. It brings before the court, matters which are within the exclusive jurisdiction of the arbitrators, and would tend to open and unravel every award, on the slightest grounds. No issue can be taken on the many large payments and advances stated in the plea. They should have been specially set forth. Choosing private judges puts the case beyond any principle of law. 1 Vez. jr. 365—7. Arbitrators have more latitude than a court of equity. Their mistakes will not be examined. Ib. 370.

Every thing will be presumed in favor of an award. The demurrer only admits facts which are well pleaded ; and the question is, whether the present plea is not substantially bad.

Mr. Lewis for the defendants. I admit that no such plea is to be found in the books of entries. But if chancery would afford relief in a case like the present, this court will exercise the same powers, to prevent a failure of justice. But reliance need not be placed on the plea, unless the award is good. An award is considered as a judgment. But whatever liberality they have received in modern times, in order to give them validity, they must be within the submission, as well to persons as things ; they must be certain, final and mutual, when expounded by themselves. 1 Bac. 212 and seq. They must appear to include the whole matters submitted ; and if they exceed the submission, such excess must be capable of separation. And so it was determined in this court, on a writ of error to April term 1797, between Harker and Huff on solemn argument.

Here the submission was confined to the bond in controversy, and the payments under it. They were not impowered to take into view the accounts of Fisher or his executors, which it seems they have done " by hearing the parties, and fully considering their accounts." And therefore they cannot be said to have acted *de et super premissis*, which was indispensably necessary. Besides the plea expressly states, that the payments and advances surmounted the principal and interest due on the bond.

It is well observed by the late Chief Justice, on the report of referees, that the same cause which would induce the court to set aside a verdict and grant a new trial, should be sufficient to vacate an award. The sacredness of awards ought not to be extended beyond that of verdicts, when errors are suggested either in clear points of law or facts. William v. Craig, 1 Dall. 315. And the President of the Common Pleas adopted the same principles, on a report under the depreciation act, in Pringle v. M'Clenachan, Ib. 487.

Courts of equity will grant relief in cases of corruption or partiality of arbitrators. 2 Wils. 148. 2 Vern. 705. Where an arbitrator refused to making his award, on the request of a party, who undertook to satisfy him as to some things which the arbitrator took to be against him, his award was set aside. 3 Wms. 362. An award was set aside in part on the mistake of arbitrators, and the balance thereon the other side. Champion v. Wenham, Amb. 245. Arbitrators mistaking law or fact, it is an error on the face of the award, and sufficient to set it aside in equity. 1 Bac. 239. Ridout v. Pain, 3 Atky 486, 495. S. C. Vez. 10, 11. But it is otherwise on a doubtful point of law, though the court should be of a different opinion. Ibid. An award is

only conclusive, until error shown. *Tillingson v. Peat*, 3 Atky. 529.

Mr. Rawle for the plaintiffs in reply. It is not necessary that the award should specify that the arbitrators have acted *de et super premissis*, but it may be supplied by words equivalent. This fully appears by the authority cited from 1 Burr. 277, the *Cobler's case*.

The objection made, is, that it is expressed in the award, that the arbitrators have fully considered their accounts. Every thing respecting the bond was submitted, and it is evident, that the true balance of accounts between the parties was to be credited on the bond. Accounts on one side would occasion accounts on the other side, if such subsisted. The pronoun *their* may be satisfied in this way ; or it may refer to the accounts of the three heirs, and the calculation of interest by the executors. Payments in continental money may have found part of the dispute. Why if the fact was so, did not the plea allege that accounts of Fisher not included in the submission, were taken into view by the arbitrators? It is confidently asserted such was not the case. But every intendment will be in favor of awards, and critical niceties are exploded.

This award is both certain and final. The submission is incorporated in the body thereof. If the obligation for 300l. was sued, the award might be pleaded in bar, and operate as a judgment to extinguish it.

It is very doubtful how far this court could interpose to grant relief in cases of mistake, by arbitrators.

[Yeates, Justice. It was determined in a case nine years ago, between Peter and Isaac Wickoff and Tench Coxe et al. that where arbitrators or referees have committed palpable injustice, or made a plain mistake, that this court would interfere. Suppose trover for a specific chattel of the value of 10l. and 100l. or 500l. damages awarded ; of a mistake of 100l. or 1000l. had taken place by an erroneous addition or subtraction, must the injured party be without remedy, for defect of a court of chancery? But such injustice or mistake must be clearly made out to the satisfaction of the court.]

Mr. Rawle in continuation. Adopting then the chancery decisions, and considering the present plea as a bill in equity for relief against the award it is not good, because it is too vague and general. The payments and dates should be stated, particularly wherein the supposed

errors rest. This was done specifically in *Champion v. Wenham*, Ambler 245, cited by Mr. Lewis, wherein the award was vacated in part. And in *Tillinson v. Peal*, 3 Atk. 529, it is said by the Lord Chancellor, that where any particular error is pretended in an award, it must be charged with all its circumstances.

A contrary practice would wholly prostrate the doctrine of awards, and prevent their beneficial effects. No one would accept the office of an arbitrator.

The court stopped Mr. Rawles from proceeding.

Shippen, C. J. The case is too plain for further argument. The award is both certain and final, and within the submission of the parties. The plea is certainly bad from its generality, and the demurrer must be sustained.

But it may be necessary for us to say something of what we would do in a proper case and on a plea, wherein the supposed injustice or mistake might fairly be put in issue and correct. We would administer equal justice between the parties, according to our powers, contrasted with those exercised by the Court of Chancery. The Chancellor might call in the arbitrators as well as parties, and examine them severally on oath, as to the alleged injustice or mistake, and thus do right between them. So on a bill for the specific execution of contracts, a court of equity possesses competent authority, and will see that the contract is performed on both sides. The policy of our government has not vested us with such powers, and therefore there are many cases wherein we cannot execute this equitable jurisdiction, so as to do complete justice in all its parts. But where a clear mistake has happened, or injustice has been done, it is in our power to correct, we will not fail to do it when it is pointed out plainly.

Yeates, J. The injustice or error alleged must be simply stated as facts, with a sufficient degree of certainty, into which the court can enquire. But we cannot enter into the particulars of an intricate dispute, which has been submitted to arbitration or reference.

Smith, J. Every fact stated in the plea may be true, and yet be no defence, for the payments and advances may really not surmount the interests due on the obligation.

Judgment for the plaintiffs, by the whole court.

AT A CIRCUIT COURT, AT CHAMBERSBURGH, OCTOBER,
1803.

CORAM, YEATES AND SMITH, JUSTICES.

Lessee of JOHN CRUNKELTON, JOSEPH CRUNKELTON and MARY BROTH-
ERTON *against* WILLIAM EVERT and JAMES WISHART.

Ejectment may be maintained by the heirs of surviving trustee, not adverse to the inter-
est of *cestui que trust*.

Every presumption is in favour of an ancient possession.

EJECTMENT for 250 acres of land in Antrim township.

It appeared in evidence that Joseph Crunkelton and James Thompson obtained letters of administration on 3d May 1749, on the estate of William Brown, and on the 10th October 1750, paid 7*l.* 10*s.* into the receiver general's office, for 150 acres of land in Antrim township, (held by the said Brown in his life-time by improvement,) to be surveyed for the children of the said Brown, and on the same day took out a warrant for the same lands, as administrators of Brown.

A survey of 250 acres and 68 perches and allowance was made hereon by John Armstrong, D. S. on 2d January 1769. Thompson died and Crunkelton survived him, who afterwards died, leaving the lessors of the plaintiff his children.

A question being made, whether the heirs at law of the surviving trustee could maintain this ejectment, the court were clearly of opinion that they might, they having the legal title in them, and the suit not being adverse to the interests of the *cestui que trust*. It is in fact so determined in *Kennedy v. Fury*, 1 Dall. 72.

But the defendants producing a bond from Crunkelton and Thompson to Bartholomew and Thomas Grogan, dated 21st July 1750, reciting that they had sold these lands to the obligees for 104*l.*, and that they had received 15*l.* in hand and bonds for the residue. The court said, that every legal presumption was against the plaintiff, after so great a lapse of time, even if he could produce the bonds uncanceled.

Plaintiff nonsuit.

Messrs. Duncan and Riddle, *pro quer.*

Messrs. Hamilton and Bowie, *pro def.*

AT A CIRCUIT, COURT AT UNIONTOWN, OCTOBER, 1803.

CORAM, YEATES AND SMITH, JUSTICES.

Lessee of WILLIAM WORKMAN and AGNES his wife, MARY GILLESPIE
and ANN GILLESPIE *against* DAVID GILLESPIE.

Settlement rights are subject to the same rules of descent as other lands :

EJECTMENT for 300 acres of land in Springhill township.

It was admitted, that Jonas Webb made a settlement on the lands in question in 1766 or 1767, and sold the same to George Gillespie, the brother of the lessors of the plaintiff. George Gillespie died in 1782 intestate of full age, unmarried and without issue, leaving an only brother, John Gillespie, who is since dead, leaving the defendant, his son.

On the 14th March 1789, John Gillespie took out a warrant for 350 acres, including this improvement, on the north side of Cheat river, on which he afterwards obtained a survey.

George Gillespie having made a parol agreement with William Workman, his brother-in-law, for 100 acres, part of the tract which he had purchased from Webb, the said John Gillespie confirmed the title of Workman to the said 100 acres, as heir at law to his brother George, on the 24th March 1783.

The counsel on the part of the plaintiff attempted to show that John Gillespie agreed that his sister should share in the lands of which their brother George died seized, and that Workman obtained the certificate of the justices respecting the time of settlement of the lands, and paid their proportion of the purchase money and surveying fees, but having failed in their proof, they submitted the whole matter to the direction of the court, without argument.

Per curiam. If John Gillespie, fully apprized of his rights, agreed to let in his sisters to share in this land, they would be entitled to recover their proportions thereof, othrwise not. As the law stood at the time of the death of George Gillespie in 1782, intestate, his lands devolved on John, his only brother, as his heir at law. Settlement rights are subject to the rules of descent of real estate, as applicable to

lands held by patent or warrant, and it has been determined in bank, that a wife was entitled to dower in lands, held by improvement right alone. We cannot presume an agreement on the part of the heir at law to divide his inheritance with his sisters. It must be proved and performed as any other agreement. The rule of descent is so clear, independent of such agreement, that we could not suffer it to be disputed; although perhaps according to the general ideas of mankind, it might be more equitable, that the sisters should inherit equally with the eldest brother.

The plaintiff suffered a nonsuit.

Messrs. Addison, Morrison and Meason, *pro quer.*

Messrs. Ross and Lyon, *pro def.*

AT A CIRCUIT COURT, AT WASHINGTON, OCTOBER, 1803.

CORAM, YEATES AND SMITH, JUSTICES.

JAMES CAMPBELL *against* HERBERT WALLACE.

Quære, whether parol evidence may be received, of a mistake made by the clerk of the peace of the county, in registering the name of a negro slave, the original return of the supposed owner being missing?

INDEBITATUS assumpsit for 106l. had and received to the plaintiff's use. Plea *non assumpsit*, and *non assumpsit infra sex annos*, and issues.

The case was this. The defendant, an inhabitant of that part of Westmoreland county, which was in 1781, erected by law into Washington county, sold to the plaintiff in 1787, a negro wench, named Beck, aged 16 years, and her child for 106l. The wench was sold as a slave, and was taken by the plaintiff into Ohio (now Brook,) county in Virginia, where she continued with him 11 or 12 years, and then under pretence of not being registered in Pennsylvania, left his service, and took with her five children, four of whom were born after the sale. She then went into the north western territory, but occasionally visited the plaintiff, with her children.

It appeared by the record of the clerk of the sessions, that the defendant, in December 1782, registered 20 negroes as slaves; that Bess and Linn were among the number, then aged

respectively 11 years ; but no slave of the name of Beck was entered, nor could the written return be found in the office.

Mr. Campbell for the plaintiff, insisted, that this was conclusive evidence, that negro Beck was not entered as the act directs, whereby she became a free woman ; and that the consideration of the agreement having failed, the plaintiff was entitled to recover back his money. He cited Addis 127, that want of title without eviction, may be given in evidence on a suit for lands sold ; also Cro. Jac. 474. Addis 271.

Mr. Ross for the defendant, stated his defence ; and offered to prove that at the time of the defendant's making his return to the clerk of the peace of the county, he possessed negro Beck, and nineteen others as slaves, and that she was then eleven years of age. Some months previous thereto, he also owned negro Bess, as a slave, (who was 20 years of age,) and her two children, but had sold them *bona fide*, to William M'Mahon, in Virginia, and they had left his service before the time of making his return. The defendant employed his cousin to make out his return agreeably to the directions of the law, both males and females.

He further offered to prove by this cousin, that he made out such return, and included Beck and Linn therein, as aged 11 years respectively, writing the former name in the usual character of his hand-writing, thus (Bectz,) and that the return so made out, was actually delivered to Thomas Scott, esq. clerk of the peace of the county within the time prescribed by law, together with the returns of slaves, belonging to Francis Wallace and John Hopkins, which appeared by the records to be duly registered.

The admission of this testimony was opposed by the plaintiff's counsel. In vain is the maxim, that a record imports absolute verity ; in vain have the legislature prescribed all the particulars of the entry, of the name and surname, occupation or profession of the owner, his township and county, the names of the slaves together with their ages and sexes, in order to ascertain and distinguish the slaves, if parol evidence can be received to destroy the effects of the registry. The precautions directed by the legislature, are too plain to be misunderstood. They intended, that what appeared on the face of the registry should conclude the supposed owner ; and every legal presumption is, that the public officer has faithfully discharged his duty. Here the faint recollections of memory are set in opposition to a written record,

and are introduced to annul its efficacy. If a deed is recorded, or an entry made by the prothonotary of an agreement, the record is conclusive. The presumption of law is in favor of liberty, and the court will not go out of the beaten road, to establish the slavery of a helpless individual. The case of negro Lncy v. Reasen Pumfrey, (Addis. 380,) is expressly in point.

The defendant's counsel answered. The present is a case of a singular nature. The testimony is offered not to contradict the registry, but to show that a mistake has happened in transcribing the return; and the entry as it stands, is naturally accounted for. Bectz might be readily mistaken for Beetz or Betz. An error in the officer ought not to be prejudicial to the slaveholder, and strip him of his interests. This species of property is still protected by the law. The act for the gradual abolition of slavery, passed 1st March 1780, (1 St. Laws, 838,) prescribes in § 5, what shall be done by the owner of the slave, and what shall be done by the clerk of the peace of the county. If the owner does what is incumbent on him, the act or omission of the clerk shall not injure him. Suppose such clerk in an outrageous fit of mistaken zeal for humanity, should refuse "to enter particulars, in a book to be provided for that purpose," of any return brought to him, will thus manumit all the slaves in the county? Here there has been a return of the defendant's slaves; for they are registered. It is not our fault that the return is missing. It is the default of the public officers. We ought not to be affected by the loss. If it could be found, any mistake in the registry might be corrected thereby. We are then reduced to a secondary mode of proof, the means of establishing the error by the primary proof, having been taken from us. If a warrant has been delivered to a surveyor to be executed, who neglects doing it, it is competent to the party to show it in evidence, on a trial of the title. The material question to be tried, is, whether the owner, previous to the sale, duly returned his negro Beck, then aged 11 years, by reason whereof, he was entitled to dispose of her as a slave. In the case of negro Bute v. Townshend, tried in the Common Pleas in this county, parol evidence similar to the present was received and the master obtained a verdict. He was registered by the name of Cute.

Yeates, J. However hard the present case may be it seems to me, that the parol evidence cannot be received, without infringing the rules of evidence, and introducing the greatest mischiefs. Records import absolute truths, and must be tried by themselves alone. They shall not be contradicted by witnesses

of the best credit. Gilb. Law Evid. 7. Co. Lit. 117, b. 260, a. 3 Bl. Com. 24, 331. Bull. 221. 1 Rol. Ab. 757. 2 Bac. Ab. 309. At the same time, I admit, with the defendant's counsel, that if the written return could be had, which was made into the clerks office, it would be received in evidence; and if it varied from the registry, it would control the same. I ground myself on this, that the return is the original record, the registry but the transcript. It is similar to a deed recorded, which differing from the record thereof, the party shall not be prejudiced thereby. No insecurity or inconvenience will arise herefrom, because there is something of a permanent nature to amend by. I would liken this case to a judgment entered by a prothonotary, for fifteen pounds. If the declaration and confession of judgment by the attorney, were for fifty pounds, I think this proof would be let in, and stand good for 50*l*. But if they were lost, no parol evidence would be received to show the error of writing fifteen for fifty, and the party's remedy would be transferred to the officer. I perfectly agree with the opinion expressed by president Addison; yet I have no objection to hearing the evidence, putting the legal point into such a train, that it may be considered again, if it shall become necessary.

Smith. J. I am of opinion the evidence is admissible. I am well aware of the danger of such parol evidence, but all these things must be judged of according to the subject matter. The defendant could not have intended to enter negro Bess when he had sold her; besides, she was 20 and not 11 years old. Many persons do not write very legibly. It has been often ruled, that if the substantial part of registering slaves is complied with, it is sufficient. Under these impressions, I think the testimony should be received and judged of by the jury; but the point may be considered as reserved.

The evidence was accordingly received, and the facts stated were fully proved by two witnesses of reputation. The jury found a verdict for the defendant.

JACOB REPSHER *against* JAMES SHANE.

On a promise of indemnity against I, the plaintiff declared that I. had recovered against him a certain sum. Proof of a recovery of a different sum by I. is no fatal variance, because the recovery is stated only by way of inducement, and not as the ground of the suit.

CASE. The plaintiff's declaration contained three counts. The first was in special assumpsit, and stated that "whereas on the 1st June

1800, at Steubenville, in consideration that the said Jacob, at the special instance and request of the said James, would convey to the said James a certain house and lot in Steubenville aforesaid, situated, &c., he the said James took upon himself, and then and there promised the said Jacob, that he the said James would indemnify, pay, and content the said Jacob for any damage which he the said Jacob might thereafter sustain by reason of an agreement of the said Jacob, and a certain Benjamin Shane, with a certain John Welch, jun. ; and the said Jacob in fact saith, that he trusting and confiding in the promise and undertaking of the said James so by him made as aforesaid, afterwards to wit, &c. did convey and make over to the said James and his heirs, the said house and lot, with the appurtenances thereunto belonging. And whereas afterwards, to wit: at August term 1802, in a certain Court of Common Pleas held in the town of Pultney, in the county of Belmont, in the territory of the United States, north-west of the river Ohio, the said John Welch, jun. in and upon the before recited agreement of the said Jacob and the said Benjamin, did, in and by the judgment of of the said court, recover of the said Jacob the sum of \$248 for the damages which he the said John had sustained by reason of the non-performance of the before mentioned agreement of the said Jacob and Benjamin, besides the costs of the said John about his suit in that behalf expended. And the said Jacob in fact saith, that the damages and costs so recovered against him by the said John as aforesaid, amount to a large sum of money, to wit: to the sum of \$300, of which the said James afterwards had notice. Nevertheless the said James, although often required, his promise and undertaking aforesaid not regarding, but contriving and intending the said Jacob in this behalf to deceive and defraud, hath not indemnified, paid and contented the said Jacob for the damage which he the said Jacob hath sustained by reason of the agreement of the said Jacob and Benjamin as before recited, but the same to do hitherto hath altogether refused, and still doth refuse, to the damage of the said Jacob," &c.

The second count was for \$400 paid, laid out and expended for defendant's use.

The third count for the like sum lent and advanced to the defendant.

The plaintiff having given testimony of the defendants promise to indemnify, offered in evidence the record of recovery in Belmont county, between the said John Welch, jun. plaintiff, and the Jacob Repsher and Benjamin Shane, defendants. The plaintiff declared in

special *assumpsit*, and on the plea of *non assumpsit*, the cause was tried on the fourth Tuesday in August 1802, when a verdict passed for the plaintiff for \$200 damages, and interest from the 14th July 1798, and costs of suit. Judgment was entered for the plaintiff for the damages and interest found by the jury, amounting to \$265, 02 cents, together with his costs about his suit expended, and the defendant in mercy, &c.

The record was indorsed thus : Damages, \$200 00

Interest on do.	49 33	
	<hr/>	\$249, 38
Bench fees,	1 35	
Prothonotary's fees,	3 00	
Attorney's,	5 84	
Sheriff's,	75	
Paid jury and constable,	3 25	
<i>Fi. fa.</i>	25	
Exemplification with } seal and certificate, }	1 25	
	<hr/>	15 69
		<hr/>
		\$265, 02
		<hr/>

The defendant's counsel prayed prayed for a non-suit, because the plaintiff in his declaration has stated a recovery against him by Welch, in Belmont county, of \$248, besides costs ; whereas the record produced is of a recovery of \$200 damages, with interest from 14th July 1798, to the fourth Tuesday in August 1802, which is stated in the record to be \$265, 02 cents, the same being in fact but \$249, 28 cents, thus disagreeing in every shape from the record counted upon. But the court directed the evidence to go on, and said, if the plaintiff obtained a verdict, and it should appear to that the variance relied on was fatal, they would direct a nonsuit to be entered. The trial accordingly proceeded, and the jury found a verdict for the plaintiff for \$283 57 cents.

Mr. Ross for the defendant, renewed his motion, and contended that he was entitled to a nonsuit, on the following authorities. In all cases of records and written contracts set out by the plaintiff in his declaration, he must prove them as laid ; for even though he was obliged to set them out, yet having undertaken to do it, he must do it properly. 3 T. R. 645-6. The plaintiff declared that the writ was sued out 24th January 1785 ; that the defendant was arrested and committed to gaol 31st January 1785 ; proof that the writ was really

sued out on that day ; but, by mistake, the writ and return were both indorsed in January 1784 ; the variance was held fatal, though evidently a mistake. 1 Term Rep. 656. If the plaintiff sets forth more than is needful in his declaration, he must, notwithstanding, prove his case as laid. 2 Bla. Rep. 1101. The doctrine of variance is fully discussed in Doug. 640, 696, and the general principle is established, that if the plaintiff undertakes to state a record, deed or other writing, any mistake is fatal.

Mr. Addison for the plaintiff answered, that there is a material difference between that which is the very ground of the action, and that which is matter of inducement or consequential to it, or which may be rejected as surplusage. The judgment stated, in which the variance is objected, is not the ground, and is only stated as the measure of damages arising from the ground of the action, and no more need to be stated accurately, than the value of goods on a *quantum valebant*. 1 Term Rep. 235. Doug. 133, 136. 2 Bla. Rep. 1050. All that was material to state, was a binding promise, a breach and some damage arising from the breach ; and the evidence of damage varying from the allegation is not material. Could oyer have been demanded of this judgment, or *nul tiel* record pleaded ?

The transcript shows enough to justify the averment in the declaration. It shows that the verdict was \$200, and above four years interest. And so the clerk ought to have certified the judgment, with the costs at the time added. But he mistook the form, and certified the judgment as including all the subsequent costs, taken from the indorsement on the transcript, which indorsement even includes the fee for the transcript. This is *vitium clerici*.

When justice has been manifestly done, courts at this day will not nonsuit for mere informality, not essential. 2 Wils. 243. 2 Stra. 909, 1131. 3 T. R. 161. The defendant's cases will not support his motion. In *Gwinnet v. Phillips et al.* 3 Term Rep. 645, the variance did not prevail, and the nonsuit was set aside. Justice Buller introduces the expressions cited, with a "perhaps," and having assigned the reason of his opinion, "because, when the plaintiff is under the necessity of stating a judgment or record, he must state it truly ; for if he do not, the answer to the action is, that that which is proved is not the same as that which is declared on." He concludes, "but in this case the variance does not consist in any part of the contract, but in an averment of matter subsequent to the contract. The averment was merely a matter of inducement to the action, and such averments need not be precisely proved."

Green v. Rennett, 1 Term Rep. 656, was probably considered as a hard action. It was however decided on the principle, that the return misrecited was material ; for, on the date of it depended whether there was any neglect of duty stated, and therefore the variance was held fatal.

Savage v. Smith, 2 Bla. Rep. 1101, was a *qui tam* action for a penalty. A judgment was stated and no proof of it given, and without a judgment, the *fi. fa.* was a nullity, and the whole ground of action failed ; but the distinction between material and impertinent averments was recognized.

Bristow v. Wright and Pugh, Doug. 640, was an action against persons, who gained nothing by the transaction on which the suit was founded. The distinction between material averments and surplusage or impertinent matter is recognized ; and between a misrecital of the very ground of the action and what is not. Lord Mansfield at first repelled the objection, and yielded to it at length, because prolixity of pleading enormously increased costs. He mentions one case, in which 100l. costs were paid for useless matter struck out. Such reason exists not here.

The court declared their opinion, that though in setting out a record, deed or written contract, which is the foundation of the action, the party must state it correctly, and a small variance is fatal, because the *allegata et probata* must agree ; yet, in the present instance, the judgment in Belmont county being set out only by way of inducement, and not as the ground of the suit, the variance in the declaration from the record given in evidence is wholly immaterial ; and therefore the plaintiff is entitled to judgment.

AT A CIRCUIT COURT, AT PITTSBURGH, NOVEMBER 1803.

CORAM, YEATES AND SMITH, JUSTICES.

Lessee of GEORGE EDDY, sen. *against* JOHN FAULKNER.

A second return of survey on an order of the Board of Property, differing from the first return, may be given in evidence to correct a mistake in the first return.

The usage of the land office as to substituting other names in applications, with the consent of the applicant, after the 22d April 1794, provided the boundaries are not changed, may be received in evidence.

No actual settlement or transfer thereof, subsequent to an adverse survey under a warrant, can be received in evidence.

Warrants for lands north and west of the Ohio and Allegheny, whereon no actual settlements have been made by reason of the Indian hostilities within two years after such warrants, are not vacated thereby.

THE plaintiff claimed under a warrant for 400 acres, north and west of Ohio and Allegheny rivers and Conewango creek, including his improvement, adjoining lands granted to Joseph Thomas, dated 25th April 1793; and a survey made thereon by John Redick and John Caruthers, under the direction of John Hoge, deputy surveyor, in March 1795.

The defendant claimed under John B. C. Lucas, esquire, as an actual settler of the lands.

The facts disclosed in evidence were as follows: On the 25th April 1793, John M'Kee entered fifteen applications in the land office, for tracts of land of 400 acres each, in his own name, Michael Berickman and others, north and west of the river Ohio. He paid no part of the purchase money; but on his return to the western country, applied to his brother-in-law the aforesaid John Rearick (who acted under John Hoge, deputy surveyor of a district) to meet him on the 11th June following at a block house on Beaver creek, to make surveys on certain warrants. He there pretended he had left his warrants at Pittsburgh through oversight, and prevailed on him to make the surveys, and run the outlines of a large tract, excluding the lands in question. M'Kee then asserted, that he would not meddle with, nor injure the claims of any of the improvers. It was testified by one witness, that John Wolff had erected a cabin fourteen feet square on the lands in dispute, but did not reside in it. He afterwards assigned in 1796, his improvement claim to John B. C. Lucas. M'Kee found the provisions during the running of the lines, but paid no surveying fees.

At this time, neither the lines of the donation lands, nor of the adjoining district of——Leet, were known to Redick, and the survey made run 62 perches into the donation lines.

Redick repeatedly demanded the warrants from M'Kee, that they might be entered in his book, as the law of 8d April 1792 directs, otherwise actual settlers might in the meantime obtain a preference. He at length found out that M'Kee had no warrants, and then he declared publicly, that the surveys he had made were inofficial and of no avail.

On the 24th May 1794, M'Kee sold and assigned his right in the fifteen applications to Gideon Hills Wells and Richard Hill Morris, in consideration of 875l., and covenanted, on the warrants being issued and put into his hands in three months, to cause regular return to be made on them, without further charge to the purchasers; than the payment of the surveying fees.

On the 12th June 1794, Wells and Morris paid into the receiver general's office 450l. specie, on the fifteen warrants including Eddy's. The names used in the applications had been previously altered, and new names substituted, but when did not appear, though M'Kee swore it was before the office was shut. Thus, instead of Michal Berickman, the name of George Eddy was inserted; and instead of John M'Kee, was inserted Joseph Thomas, &c., but the descriptive parts of the applications were not otherwise changed in the most minute particulars. This was fully proved by the officers of the land office to have been the uniform usage, and the names so substituted were always considered as standing in the places of the original appliers.

On the 18th August 1794, George Eddy's warrant was entered in the book of deputy surveyor.

In March 1795, the aforesaid John Redick and John Caruthers crossed the Ohio to make the surveys on the fifteen warrants issued, and 171 other warrants; they were interrupted by armed men, who complained they were running in their claims, though none of them at the time resided on that side of the river. These men were at length induced to permit the surveyors to run certain outlines, which were afterwards subdivided, and the warrants applied thereto, by John Hoge, at Washington. Mr. Hoge carried the returns of survey to Philadelphia, and there signed them, and by mistake returned the survey for Eddy, as made on 12th May 1794, before the warrant issued. But this mistake was corrected by a new return, under an order of the Board of Property, dated 8th June 1803. The survey returned for Eddy included the lands in question, and there was no actual settlement made thereon in March 1795.

In the course of the trial, the defendant's counsel contended, that the second return of survey ought not to be received in evidence, inasmuch as it contradicted the first return made by John Hoge, the regular deputy surveyor of the district, where in it was stated that the survey was made on the 12th May 1794.

But the court overruled the objection. No official survey could be made till the warrant issued, and this could not be till after 12th June 1794, when the purchase money was paid. The mistake is evident on a comparison of dates, and the second return is the mere correction of an error, as to the real time of the survey being made. It must go to the jury, with the parol testimony of the artists on the ground, together with the first return, and must be judged of by them. It would be the height of injustice to affect an honest claim to lands by the oversight of a surveyor in making his return. Such return is but evidence of the survey. What has been done on the ground is the real survey, and has been often so determined.

It was further objected, that the depositions of the land officers taken under a rule of court, stating the usage beforementioned, could not be admitted to be read, because that usage, instituted by themselves, runs counter to the act of assembly passed on the 22d April 1794, (3 St. Laws 581,) and supersedes the usual course of the law. But the court overruled this objection also. The substitution of other names, with the consent of the original application, is not prevented by the act. It is no new application, unless the boundaries of the lands applied for are changed. That law, which provides, "that all applications for lands, which may remain on the files of the land office after the 15th June then next, and for which the purchase money shall not have been paid on that day, shall be null and void," necessarily implies, that such applications, on which the purchase money shall be so paid, shall be valid foundations of warrants, which are antedated by official usage, so as to correspond with the times of the applications filed. Such substitution neither injures the state nor the interests of any individual.

The defendant offered the assignment of the improvement claim, by John Wolf to John B. C. Lucas, dated 23d January 1796, in evidence. But it being admitted that no actual settlement was made on the lands antecedant to the survey made for the plaintiff in March 1796, the assignment was declared by the court to be irrelevant. 2 Bos. and Pull. 525. No actual settlement, subsequent to an adverse survey, can confer

a title, or be received in evidence. It follows therefore that no transfer of it can be received.

Finally, it was insisted that the plaintiff's warrant was utterly void and dead in law, no actual settlement having been made on the lands within two years after the date of the warrant. But the court said this point had been so often determined otherwise, under the then existing state of the country across the Ohio and Allegheny, that they could not now suffer it to be disputed.

A bill of exceptions to the opinion of the court on the foregoing points stated, was tendered and sealed.

The jury gave a verdict for the plaintiffs.

Messrs. Addison and Woods, *pro quer.*

Messrs. Ross and Foster, *pro def.*

The judgment on this verdict was affirmed on a writ of error, after argument, at Pittsburgh, in September term 1806. 1 Binn. 188.

AT A CIRCUIT COURT, AT GREENSBURG, NOVEMBER 1803.

CORAM, YEATES AND SMITH, JUSTICES.

LEONARD SILVIUS and JOHN SILVIUS *against* JOSEPH SMITH.

Action of assumpsit, removed into the Circuit Court by the defendant, wherein the plaintiff recovers damages under 10l. he is not entitled to costs.

THE plaintiffs declared in special *assumpsit*, and recovered against the defendant \$17⁶/₁₀₀ damages on trial. The defendant removed the cause by *habeas corpus*, and the question arose whether the plaintiffs or defendants should pay the costs?

By the Court. The act of 20th May 1767, § 3, (1 St. Laws 480 will not govern this point. The act of 5th April 1785, (2 St. Laws 304) was repealed by a temporary law of 19th April 1794, (St. Laws 536) and the repealing law by another act, (4 St. Laws 265) and does not expire till the end of the next session. The 1st section thereof extends the jurisdiction of the justices of the

peace from 5*l.* to 20*l.* and direct, that "any person who shall bring any suits or action in other manner than is provided by the act, in cases cognizable under the act, and therein cognizable under the act, and who shall not recover 20*l.* and more, shall not have judgment therein for any costs by him expended.

The plaintiffs therefore should have instituted their suit before a justice of the peace, and having chosen another jurisdiction are not entitled to costs. The same point having been determined in bank within the present year.

Judgment for the plaintiff for the damages without costs.

Mr. Addison *pro quer.* Mr. Ross, *pro def.*

JACOB ROMANS *against* ANDREW ROBERSTON.

Unless a clear mistake in the award of arbitrators is pointed out and ascertained, the court will not examine into the award.

COVENANT on a written agreement, to stand to the award of Aaron Williams, James Magrew and James Montgomery, who were chosen to settle a difference between the parties, respecting the price of a mill bought by the plaintiff from the defendant, and the improvements made thereon by the plaintiff, the parties allowing the bargain to be avoided, dated 20th February 1800.

The arbitrators awarded on the same day, that the plaintiff should give up possession of the mill to the defendant, against the first day of April then next; that the defendant should give up his bonds to the plaintiff, and further to pay to him 78*l.* 17*s.* 6*d.* within one year, after he should receive possession of the premises.

The breach was assigned in non-payment of the money.

The defendant pleaded covenants performed, with leave to give the mistake of the arbitrators in evidence.

Mr. Ross for the defendant called the arbitrators.

The court observed, that the examination must be confined to some plain error, either of law or fact. To go through the different disputed articles in detail, could not be allowed, either on principal or precedent. It would defeat the very objects of arbitration.

Mr. Ross declared himself fully aware of the rules established by the court, and would conform thereto.

It appeared, that the two first named arbitrators, sometime after making their award, subscribed a paper, at the solicitation of the defendant, expressing some repugnance to the settlement they had made.

Williams testified, that he thought they had made a small mistake in their award ; and if the business was to be gone into again, he believed it would be altered.

Magrew declared, that they took all matters into consideration, when they first sat as arbitrators, and his judgment fully concurred in what had then been done. He altered his mind afterwards on the representation of the defendant, and then thought they had committed a small mistake, but at present he did not remember particulars. He signed the second paper without reflection, and was much dissatisfied with himself, for having subscribed it.

Montgomery the last arbitrator, testified that all the matters in variance between the parties, were laid before the arbitrators, who fully considered the same, and after bestowing ten hours of their time on the business, concurred in opinion, and signed the award. He was satisfied at the time, and saw no reason to alter what had been done ; he did not think they had made any mistake.

By the court. The defendant's witnesses have failed him. Surely there is no satisfactory proof of some plain mistake exhibited to the jury ! It would be highly dangerous to go further into this kind of testimony ! William and Magrew having heard the statement of the defendant alone, and having been improperly prevailed upon to express dissatisfaction with the award they had made, are now called upon to justify what they have done. But even Magrew is dissatisfied with himself.

Unless a clear mistake in the award is pointed out and ascertained, we will not re-examine the transactions of judges of the parties own choosing.

The jury gave a verdict for the plaintiff for 91*l.* 1*s.* 9*d.* without leaving the bar.

Mr. Young, *pro quer.*

Lessee of THOMAS BUCHANAN *against* ADAM NYER.

An actual settler, who prevents the warrant holders from making a settlement and improvement within the period limited by law, shall not urge the non-performance of the conditions of settlement in his defence.

EJECTMENT for 400 acres of land, in Buffalo township, in Armstrong county, within the jurisdiction of Westmoreland county. The plaintiff claimed under a warrant for lands across the Allegheny, dated 3d February 1794, and a survey of 405 acres 112 perches, made thereon 19th April 1795.

It appeared that no person was settled on the land at the time of the plaintiff's survey. On the 1st June 1797, a surveyor was employed to trace the lines, but was threatened by the defendant, that he would cripple him if he did not desist. He held a gun in his hand, which he cocked, and declared he would shoot any one who would attempt to settle on the lands in question. By these means several persons were intimidated from going on the lands to make a settlement.

The matter was submitted to the charge of the court.

It was said by them, that there having been no actual settlement anterior to the plaintiff's survey, the plaintiff's title must prevail, unless it has been accorded by his non-performance of the conditions of settlement and improvement. But who has prevented his performance? Who expects to derive a benefit from this improper conduct? The answer is the defendant. If we count the period from which the settlement is to commence, from the 22d December 1795, the ratification of the treaty at Fort Grenville, the defendant has within the time allowed for making the settlement, obstructed the plaintiff or his agents, from complying with the law: and according to all our decisions shall reap no advantage therefrom. If the case was even dubious, the defendant's lawless conduct should postpone him, on principles of general policy and safety.

Verdict for the plaintiff instanter.

Mr. Woods, *pro quer.* Mr. Addison, *pro def.*

Lessee of JOHN DAVIS *against* JOSIAH WHITE and ANNE CHESNUT.

Copy of a survey not returned, nor verified by the surveyor who made it, cannot be received in evidence.

The plaintiff claimed 400 acres of land, across the Allegheny, now in Armstrong county, but within the jurisdiction of Westmoreland county, as an actual settler. He claimed under one Edward M'Gee, who was said to have first stated himself on the land, in the spring of 1793, and a survey.

The certificate of Stephen Gapen, deputy surveyor of the district, of a survey made by him of 182 acres and 88 perches on the 11th March 1798, under the improvement made by M'Gee, begun three days before, was offered in evidence; but overruled by the court.

Several decisions have established, that the actual settler, in conformity with the law, must have obtained a survey, before he can recover in ejectment; but the present paper is mere hearsay; it is no more than a written declaration of what the surveyor has done, and he is not here to verify it. If the survey had been returned into the surveyor general's office, a copy of it would have been evidence, by reason of the sanction it thereby obtains. The plaintiff cannot proceed, but must be nonsuited.

It being however alleged, that this would be a surprize on the counsel, the present copy having been received in evidence, on a former trial in the Court of Common Pleas, between the same parties, a juror was withdrawn by consent on the lessor of the plaintiff agreeing to pay the costs of the court.

Mr. Addison, *pro quer.*

Mr. Sample, *pro def.*

AT A CIRCUIT COURT, AT BEDFORD, NOVEMBER, 1803.

CORAM, YEATES AND SMITH, JUSTICES.

Lessee of JOHN HOLMES *against* THOMAS HAY.

An improver of lands, taking out an application including his improvements, and obtaining a survey, is thereby concluding, and cannot hold contiguous lands under his improvement right.

EJECTMENT for 300 acres of land in Bedford township.

The plaintiff claimed 1st July 1762, for 200 acres, including an improvement made by his father, Joseph Nelson, at a place called the Shawanese Cabin, on the great road, about eight miles westward from Bedford.

Nelson brought an ejectment against the now defendant, for these lands in Cumberland county, to October term 1762, in which a rule was obtained for the tenant to appear, and plead in 20 days, or judgment against the actual ejector. No judgment was entered thereon; but a writ of possession was issued to January term 1763, which was not returned.

A judgment being obtained in July term 1770 against Nelson, the lands in question were levied on, upon a *alias fieri facias*, returnable to October term 1771, and the same having been condemned by an inquisition taken on the 24th April 1790, Thomas Buchannan, esq., the then sheriff, by deed dated 15th July 1790, conveyed the premises to the lessor of the plaintiff in consideration of 53*l.* 10*s.* which was duly acknowledged in court.

The plaintiff's counsel, before they examined their witnesses, also showed an application of Thomas Hayes, for 200 acres on the waters of Shawney Cabin creek, adjoining William Thompson and Thomas Nelson, including his house and other improvements in Cumberland county, dated 4th November 1766 and a survey made thereon of 170½ acres, on the 28th April 1784, adjoining the said Thompson and Nelson and others, which application the defendant on the 6th May 1780, granted and conveyed to John Graham in fee.

The plaintiff's difficulty lay in ascertaining, that a survey had been made under Nelson's warrant. Proof was given that the lines were marked on all the different courses, except one. Most of these however agreed with the surveys of the adjoining tracts; but a swamp

white oak was discovered beyond the old road where there was no correspondent survey, which on being blocked, counted not less than 40, nor more than 42 years back. One witness moreover testified, that the defendant acknowledged nine years ago, that the survey had been made on Nelson's warrant; and showed where it crossed the Mile Hill. And another witness testified, that he heard the defendant declare between 1769 and 1773, he was the owner of the tract which he afterwards sold to John Graham, but that Nelson had the right to the tract in question, and that it did not belong to him, the defendant.

The defendant rested his pretensions on a settlement and improvement. It was asserted, that he had built a house on the tract in dispute, and cleared a few acres in 1758, adjoining to, but distinct from the lands and improvements which he had sold to John Graham, and had occupied the same ever since.

The plaintiff's counsel objected to any evidence being received of such improvements. A man can have but one settlement. The defendant's application calls for his improvements, and also for Thompson and Nelson. The survey made thereon also excludes the lands in dispute, and all the adjacent surveys bind on Nelson.

The defendant's counsel answered, that a man might have more than one improvement. It was customary to take up lands in this way, in order to provide for a person's children.

Yeates, J. It is most usual to go into the evidence of improvements, and for the court to declare its operation afterwards, on the whole case coming before them. But by the plaintiff's anticipation of the title of the defendant, the legal question is brought before the court on the testimony produced by the plaintiff alone. If I am called upon for my opinion, on what I have hitherto heard, I have no difficulty in saying, upon the evidence before us, that the defendant is bound by the terms of his application, and the survey made thereon, both which exclude the lands in question.

Mr. Duncan for the plaintiff, observed, that the two titles were so intermixed, that the plaintiff was necessarily impelled to disclose the defendant's application and survey, to render the testimony of the witnesses intelligible. He was content, that the legal question should be determined, as if taken up on the defendant's offer of the present testi-

mony, and the objection made thereto, on showing the defendant's application and survey. This was not the case of two improvements made for the father and children, for it was well known that the defendant, though married many years, never had a child.

Yeates, J. The matter must be judged of under the offer of the parol evidence, and the exception taken thereto. The improvements are said to have been made on distinct contiguous tracts, by a man without children. The defendant's application in November 1766 is very minute and particular. It designates Thompson and Nelson as abounding thereon, and it includes the defendant's house and other improvements generally, without restriction. It therefore excludes the tract in controversy. Is not then the defendant concluded under such circumstances, by the lines he has himself established? If he is so bound, can I deny that the evidence offered confers no right, and is therefore irrelevant? The testimony strikes my mind as giving not a shadow of title to the defendant, and if heard, it could answer no purpose whatever. (2 Bos and Pull. 525.) I therefore feel myself bound to overrule it.

Smith, J. Having formerly been concerned as counsel, between another plaintiff and this defendant, wherein the title to these lands came in question, I have hitherto declined giving any opinion in this case. On the abstract question, however, I am compelled to declare, that I perfectly concur in the opinion which has just been delivered.

At the instance of the defendant's counsel, the court adjourned the further hearing of the cause. During the adjournment, a compromise took place between the parties, and at the meeting of the court, by consent, a verdict was given for the plaintiff.

Messrs. Hamilton and Duncan, *pro quer.*

Messrs. Clark and Brown *pro def.*

Lessee of GOTLIEP REIGART *against* CONRAD HAVERSTOCK and CHRISTIANA SAMEL.

An improver of land, whether plaintiff or defendant, who takes out an office-right, and does not insert therein the true date of his improvement, shall not be allowed to give evidence of improvements prior to the time expressed in the office-right.

EJECTMENT for 250 acres of land in Bedford township.

The plaintiff claimed under an application entered 17th November 1766, and a survey thereon made 10th April 1790. The defendants claimed under a warrant dated 2d November 1774, whereon interest was to commence from 1st March 1767, a survey made thereon on the 27th December 1785, and a patent dated 13th April 1786.

The defendant's counsel offered to show a settlement made on the lands in question in 1761, and continued since that time.

It was objected, that he could go on further back than 1767, when the interest on his warrant commences.

The defendants replied, that they might shelter themselves under a settlement, prior to the period of interest commencing, as expressed in their warrant, although a plaintiff out of possession was bound thereby and could not do so.

By the court. There can be no just ground of distinction between the two cases. When either the plaintiff or defendant attempts to defraud the commonwealth, by not charging themselves with the full interest from their respective periods of improvement, it must at least operate as an abandonment of their claim for such intermediate time as they have dropped, and we shall hold them bound thereby. Both instances must rest on the same uniform principle. If indeed the defendant does not show his warrant or application in evidence, and it is not produced by the adverse party, the defendant may rest on his possession, and prove his settlement from its commencement. Circumstanced at this case is, the objection must be sustained, and so have been our decisions.

The evidence having been gone through, it appeared that the lessor of the plaintiff had been guilty of gross laches, and the court gave a decided charge in favor of the defendants.

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| 2. A deed from commissioners, for lands sold for non-payment of taxes, under their common seal, is no evidence of title. <i>Simon's lessee v. Brown.</i> | 186 |
| 3. Want of proof, that the names of the commissioners of the county had been returned to the sessions, will not invalidate a sale for non-payment of taxes; but there must be due proof of assessment and advertisement. <i>Blair's lessee v. Caldwell.</i> | 284 |
| 4. The valuation by the assessors, under the law of 11th April 1799, is binding on the county commissioners, and they cannot revise or alter it. <i>Respublica v. Deaves.</i> | 465 |

CONSTITUTION.

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| 1. The court in a doubtful case, on a rule to show cause why an information in the nature of a <i>quo warranto</i> should not be filed, will not determine whether an appointment to office by the governor be constitutional or not. <i>Respublica v. Dallas.</i> | 800 |
| 2. The offices of city recorder, or justices of the peace, are not constitutionally incompatible, with offices of trust or profit under the United States. | ib. |

CONTEMPT.

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| 1. The publication of a paper to prejudice the public mind in a cause depending, is a contempt, if it manifestly refers to the cause, though it does not expressly appears on the face of the writing. <i>Bayard et al. v. Passmore.</i> | 438 |
| 2. But however libellous the paper may be, the court can have no cognizance of it in a summary way; unless it be a contempt. | ib. |

CONTINGENT REMAINDER AND EXECUTORY DEVISE.

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| 1. Devise of a plantation to H. and her male heir forever, that is to say, her son T., in case he shall live to come to age and enjoy it; but if T. dies before then, then to I, in fee, subject to certain legacies. T. arrives at full age, but died before his mother without issue; adjudged that E. took an estate for life, and having survived her son, the remainder over to I. was good by way of executory devise. <i>Harris's lessee v. Potts et al.</i> | 141 |
| 2. A father devises to his son F., his heirs and assigns, certain lands, subject to the payment of 2800 <i>l.</i> in instalments, to his son P., and to his son F.. his heirs and assigns, other lands; but in case F. or P. shall die under 21, or without issue, then and in that case he gives the share of the son so dying unto his other son in fee; and in either case the survivor of his sons shall then pay to his daughter E. 500 <i>l.</i> out of the last payments of the instalment. Testator by his codicil, orders that F. shall not sell his lands devised to him till the age of 80 years, and then he may do with them as he pleases. F. attains 21, but dies before 80, without issue, intestate; the devise over to P. is good as an executory devise. (But reversed on error.) <i>Hauer's lessee v. Shitz.</i> | 205 |

CONTRACT.

(See Agreement.)

CONVICTION.

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|---|-----|
| 1. Mayor's conviction under a city ordinance for huckstering, must charge the defendant as a huckster, with selling, or offering for sale, at second hand, within the market. It must appear that the offence was committed within the city, and that the defendant was convicted of the offence. <i>Mayor of Philadelphia v. Nell.</i> | 475 |
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CORPORATION BY-LAW.

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| 1. In proceedings on a by-law, it must appear, that the special authority of the corporation was strictly pursued. <i>Commissioners of Southwark v. Neil.</i> | 54 |
|---|----|

2. Mayor's conviction under a city ordinance for huckstering, must charge the defendant as a huckster, with selling, or offering for sale, at second hand, within the market. It must appear that the offence was committed within the city, and that the defendant was convicted of the offence. *Mayor &c. of Philad. v. Nell.* 475
 Quære, whether, if the warrant be not issued in the name of the commonwealth, the exception be not fatal? ib.
8. The city ordinance of 29th March 1799, respecting the procuring of a supply of water, is valid. *Stiles v. Jones et al.* 491

COSTS.

1. No damages or costs in dower, where the husband does not die seized. *Sharp v. Pettit.* 88
2. Where it is objected that witnesses have been summoned unnecessarily to swell a bill of costs, court will interfere only in cases of manifest oppression. *De Benneville v. De Benneville.* 558
3. Where a defendant removes a cause, he is not liable to costs, if the plaintiff becomes non-suit. *Wolff v. Turner.* 559
4. Action of assumpsit removed into the Circuit Court by the defendant, wherein the plaintiff recovers damages under 10*l.* he is not entitled to costs. *Silvius v. Smith.* 588

COURT, SUPREME COURT.

1. The certificate of counsel, on an appeal from the Circuit Court, resting on facts, not apparent on the record to the Supreme Court, must be made during the sitting of the Circuit Court. *Cay's ex'rs v. Gibson.* 122
2. The court have a control over their rules; and where a view has been had, though founded on the certificate of counsel, where it is improper and unnecessary, it will be discharged with costs. *Nesbitt's lessee v. Kerr.* 194
3. On an appeal from the Circuit Court, to the Supreme Court, counsel must subscribe a certificate, and file the proceedings of the Circuit Court with the prothonotary, before the first day of the next term. *Gallagher v. Hamilton's administrators.* 821
4. Court, in examining the proceedings of justices of the peace, will call in the aid of affidavits, to see whether they have exceeded their jurisdiction. *Burginhofen v. Martin.* 479
5. The Supreme Court have the power of reviewing the proceedings of justices, in cases where no appeal is given to the party: their jurisdiction is only abridged by the express negative words of a statute. ib.

COVENANT, ACTION OF.

1. In covenant, on the plea of covenants performed, the defendant must begin the evidence, and conclude to the jury. *Morris et al. v. Insurance Company of North America.* 84

CREDITOR AND DEBTOR.

1. A creditor neglecting to sue his principal debtor, on the application of a surety, does not thereby discharge the surety. *Dehuff v. Turbett's executors.* 157

CUSTOM, USAGE.

1. The usage of plaisterers, in charging half the size of the windows, at the price agreed on for work and materials, is unreasonable and bad. *Jordan et al. v. Meredith.* 818

D

DAMAGES.

1. No damages or costs in dower, where the husband does not die seized. *Sharp v. Pettit.* 88

DECEIT.

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|---|------|
| | Page |
| 1. If one sells an unsound horse, knowingly, and conceals that circumstance, and receives a sound price, he is answerable for the deceit; <i>aliter</i> , if he was ignorant that the horse was unsound: but if one sells with warranty, he is answerable, whether he knew the horse to be unsound or not. <i>Kim-mel v. Lichty</i> . | 262 |

DECLARATION.

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| 1. Filing of a declaration in causes submitted to reference, is not indispensably necessary. <i>Barde's administrators v. Wilson</i> . | 149 |
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DEEDS.

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| 1. A deed recorded without a proper probate, is no evidence of notice to subsequent purchasers. <i>Simons' lessee v. Brown</i> . | 186 |
| 2. A deed by husband and wife, joint-tenants, executed in Maryland, and acknowledged before two justices of the peace, and of the Common Pleas at Baltimore, with a certificate under the county seal, that there were at that time no superior magistrates or peace officers in the county, allowed to be read in evidence. <i>M'Intire's lessee v. Ward</i> . | 424 |
| 3. Re-delivery of a deed, by a feme covert, after her husband's death, presumed from circumstances. <i>Evans v. Evans</i> . | 507 |

DEFALCATION, SET-OFF.

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| 1. D. procures a policy of insurance to be made on a vessel for himself and others, concerned in the same, and on a loss his executors recover judgment against the underwriter B., who had before obtained judgment against D.—B is entitled to a set-off, though it should appear that O. owned half the vessel. <i>Darrah's executors v. Bayard</i> . | 152 |
| 2. Bond by A. and B. to C. assigned to D. a joint bill by E. and C. assigned after the death of E. to A. before the assignment to D., is a good set-off against the bond sued by D. <i>Robinson v. Beall et al.</i> | 267 |
| 3. A policy of insurance is assignable in equity, and every set-off between the insurer and insured obtains against the assignee, unless, as in the cases of bonds, there has been deception on the assignee, on receiving information of the assignment. <i>Gourdon v. Insurance Company of North America</i> . | 327 |

DESCENT, HEIR.

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| 1. Settlement rights are subject to the same rules of descent as other lands. <i>Workman's lessee v. Gillispie</i> . | 571 |
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DEVISE.

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| 1. Devise to M., her heirs and assigns, and M. dies in testatrix's life-time, leaving an infant son, the devise is lapsed and void, though testatrix was assured that the son would take, by one interested in the estate. (Parol evidence of the intentions of testatrix in such case not admissible.) <i>Sword's lessee v. Adams</i> . | 34 |
| 2. Devise by husband of one-third of his personal estate to his wife, and the use of one-third of his lands while she remained his widow, and also one cow over and above her thirds, and all the rest of his estate to his children, will bar the widow of her dower, on her acceptance of the devise. <i>Creacraft v. Dille</i> . | 79 |
| 3. Devise of a plantation to E. and her male heir, forever, that is to say, her son T., in case he shall live to come to age and enjoy it; but if T. dies before then, then to I. in fee, subject to certain legacies. T. arrived at full age, but died before his mother without issue; adjudged that E. took an estate for life, and having survived her son, the remainder over to I. was good by way of executory devise. <i>Harris's lessee v. Potts et al.</i> | 141 |
| 4. Devise of lands to three sons in fee, but if either of them die without children, then the same to be divided equally among the other children, or to be sold and the money divided among them, and executors appointed in trust for the purposes and intents in the will, and overseers appointed to see it well performed; on the death of one of the sons without children, the surviving executors may sell the lands devised to him. <i>Jenkins's lessee v. Stouffer et al.</i> | 163 |
| 5. A devise may operate in different ways, according to subsequent events. (See Contingent Remainder, &c. § 2.) <i>Hauer's lessee v. Shitz</i> . | 205 |

DISCONTINUANCE. Page

1. Discontinuances are the acts of the court, and subject to their discretion. They will not be allowed after a cause has been referred, and the evidence heard by the referees. Pollock v. Hall. 42

DISTRIBUTION.

(See Intestate.)

DIVORCE, ALIMONY.

1. On a sentence of divorce, the wife's disclaimer of alimony is not a perpetual bar to future applications. M'Karraher v. M'Karraher. 56
2. Where there has been a reconciliation between the parties after a divorce, a new divorce is necessary to found the wife's claim of alimony. ib.

DOWER.

1. To bar a widow of dower by a devise, it must be either so expressed, or there must be a strong and necessary implication to that effect; or it must be inconsistent with or repugnant to her claim. M'Cullough v. Allen et al. 10
2. No damages or costs in dower, where the husband does not die seized. Sharp v. Pettit. 88
3. Devise by husband of one third of his personal estate to his wife, and the use of one third of his lands while she remained his widow, and also one cow over and above her thirds, and all the rest of his estate to his children, will bar the widow of her dower, on her acceptance of the devise. Creacraft v. Dille. 79
4. Tenant in dower may clear woodland assigned to her in dower, provided she does not exceed a just proportion of the whole tract. Hastings v. Crunkleton. 261

E

EJECTMENT.

1. Where one defendant in ejectment states a special defence, disclaiming, particular lands, and another defendant who has taken a special defence gives it up on a trial, the former shall not be at liberty to show an early adverse right to the lands he has disclaimed. Steel's lessee v. Finley. 169
2. Narr in ejectment, by tenants in common, *quod demiserunt*, is ill. Steinmetz's lessee v. Nixon. 285
3. One discharged as an insolvent debtor, cannot support an ejectment for lands previously vested in him, though his trustees have not given bond pursuant to the act of 4th April 1798. Willis's lessee v. Row. 520
4. Ejectment may be maintained by the heirs of surviving trustee, not adverse to the interest of *cestui que trust*. Crunkleton's lessee v. Evert et al. 579

ELECTION, GENERAL.

1. Under the election law of 15th February 1799, the inspector has no right to exact an oath of a citizen, claiming to vote, that he did not join the British forces during the late war, or was not attainted of high treason. Republica v. Gibbs. 429
2. To constitute the offence of intimidation, threats, violence, or interruption, under the 17th section of the election law, there must be a preconceived intention for the purpose of intimidating the officers, or interrupting the election. ib.

ERROR, WRIT OF ERROR.

1. A writ of error, or certiorari, will not remove an indictment without a special *allocatur*, or the consent of the attorney general. Sheffer in error v. Rempublican. 89
2. *Scire facias* on a recognizance on a writ of error, may issue before the term in which the record is remitted to the Supreme Court, on the affirmation of the judgment in the Court of Errors and Appeals. Daintry v. Johnston. 148

ESCAPE.

1. In debt against a sheriff for an escape, evidence that he did not arrest the prisoner till three days after the return of the *ca. sa.* (which he had returned in custody,) is inadmissible. *Shewell v. Fell.* 17
2. The statutes of the 13th Edw. 1, c. 11, and 1 Rich. 2, c. 12, concerning escapes, extend to Pennsylvania. ib.
3. In debt for an escape from *ca. sa.* the jury must find the whole debt and costs. ib.
4. Sheriff not liable for an escape, where an insolvent debtor, taken under a *ca. sa.* out of the Supreme Court, has been discharged by two justices of the Common Pleas of the county where he lives, on giving bond pursuant to the 14th section of the act of 4th April 1798. *Stevenson et al. v. Caruthers.* 180

EVICTION.

1. Inquisition on a claim against the state, upon an eviction of lands, sold by the agents of forfeited estates, under the act of 6th March 1778, confirmed, though no possession had been delivered by council, and the purchaser had failed in an ejectment commenced against an adverse claimant, by title paramount. *Conyngham v. Rempublicam.* 471

EVIDENCE.

1. Counsel or attorney, shall not be permitted to disclose confidential communications of their client, but may give evidence of collateral facts, or that their client expressed himself satisfied with a new security. *Heister v. Davis.* 4
2. Defendant, on the plea of payment to a bond, must specify the particulars of the defence, as to want of consideration, fraud, &c. if required by the plaintiff, or he shall be precluded from giving the same in evidence. *Greenwalt v. Born et al.* 6
3. A legatee in right of his wife, transfers the legacy, and takes a bond therefor. He previously purchases goods of the executors of the testator, and they insist on retaining the amount against his assignee of the legacy. This may be given in evidence on the plea of payment against the equitable assignee of the bond. *Baughman v. Divler.* 9
4. In debt against a sheriff for an escape, evidence that he did not arrest the prisoner till three days after the return of the *ca. sa.* (which he had returned in custody,) is not admissible. *Shewell v. Fell.* 17
5. Letter of a deputy surveyor to his assistant to make a survey, is good *prima facie* evidence, though not proved to have been delivered, and the survey has been made after the death of the deputy; but it may be repelled by other proof. *Bell's lessee v. Levers.* 23
6. Where a partnership is sworn to by a clerk of one of the partners, the books may be given in evidence to fortify, or discredit his testimony. *Moyes et al. v. Brumaux.* 30
7. Misrepresentation to effect a policy of insurance, is not to be presumed. The burthen of the proof lies on the person who would avail himself of the fraudulent conduct imputed; but circumstantial evidence is all that can be expected in cases of this nature. *Pine v. Vanuxem et al.* 30, 33
8. Parol evidence of the intention of a testatrix, not admissible. *Sword's lessee v. Adams.* 34
9. Evidence of improvements made to the westward in consequence of a military permit, shall not be received, unless an office right has been taken out therefor by the beginning of August 1769. *Gratz's lessee v. Campbell.* 72
10. The presumption that a survey has been made with the party's consent, may be rebutted by circumstantial evidence. *Merchant's lessee v. Millison.* 73
11. A policy of insurance may be explained and controlled by the written order to make the insurance. *Norris et al. v. Insurance Company of North America.* 84
12. In a suit against a surety, on a recognizance for good behavior, the confession of the principal, that he had published certain libels, may be given in evidence: *aliter*, of the admissions of the counsel for the principal, on a former cause; nor can the verdict and judgment in the former cause, between different parties, be received in evidence against the surety. *Respublica v. Davies.* 128

13. Distributing newspapers, containing libellous matter, and the clerk of the printer receiving payment for them, evidence of the publication of a libel. *ib.*
14. Service of a notice of a rule to take depositions, on the plaintiff's wife, though a party in the process, is not good, if she has not acted in the business. *Bauman v. Zinn et al.* 157
15. Nor on the special bail, though he attended and cross-examined the witness, if another person actually acted as agent. *Weaver v. Cochran.* . 168
16. One claiming lands under the assignees of a bankrupt, need not show the trading and act of bankruptcy, against a title adverse to the bankrupt's. *Scott's lessee v. Leather.* 184
17. A copy of the commissioner's assignment to the assignees, certified by their clerk, admitted in evidence. *ib.*
18. Exemplification of a deed recorded in Philadelphia county for lands lying in several counties, received in evidence, the original being shown to be lost. *ib.*
19. The release of an equitable interest arising from the discovery of vacant lands, may be shown by parol testimony. *ib.*
20. A deed recorded within a proper probate, is no evidence of notice to subsequent purchasers. *Simons' lessee v. Brown.* 186
21. In partition, on the plea of *non tenent insimul*, the defendant may show in evidence an agreed line by the former owners, though his deed poll grants to him an undivided interest. *Bates v. M'Crory.* 192
22. An original ancient letter from an assistant to the deputy surveyor of the district, indorsed by him, and found among the office papers, mentioning that he had received an order from G. A. for a survey made for him, allowed in evidence, as a receipt for surveying fees. *Peterson's lessee v. Logan.* 195
23. Where a person claiming an application, asserts that G. C. presented him with it, an original memorandum of G. C. that he had the lands under his care for another, admitted in evidence. *ib.*
24. In a suit for the consideration of a slave, recommended as honest, purchaser cannot give evidence of his being suspected of felony. *Cook v. Neaff.* . 259
25. Evidence of the debt on which a sheriff's sale of lands was founded, being paid previous to the sale, shall not be received to affect the title of a stranger who has purchased. *Aliter*, if the plaintiff in the execution is the purchaser. *Samms' lessee v. Alexander.* 268
26. Parol evidence will not be received to prove the contents of written papers, unless they are proved to be lost, or in the possession of the adverse party. *Campbell v. Wallace.* 271
27. Evidence of improvements antecedent to the time of interest commencing, as stated in the warrant, shall not be received. *Nicholl's lessee v. Lafferty.* 272
28. Proofs of actual settlement must be subsequent to the law of 8d April 1792. *Wilkins's lessee v. Allenton.* 273
29. Recital in a warrant of acceptance, will be evidence against the late proprietaries, and those claiming under them by subsequent rights. *Aliter*, of those under elder rights. *Elliott's lessee v. Bonnett.* , 287
30. A warrant improvidently issued, without any money paid, directed by the surveyor general to a deputy to be executed, and a survey thereon, permitted to be read in evidence. *Dougherty's lessee v. Piper.* 290
31. Minutes of the Board of Property are uniformly read to show what passed before them. *ib.*
32. In many cases, acts done since the ejectment brought, may be given in evidence. *ib.*
33. Letter from a captain to his owner, cannot be received on the part of the owner, as proof of property shipped, without invoices or bills of lading. *Crousillat v. Ball.* 375
34. Captain's protest is evidence on a policy of insurance. *ib.*
35. A warrant issued without money paid, and an inofficial survey thereon, permitted to be read in evidence. *Nicholas's lessee v. Holliday.* 399
36. A deed by husband and wife, joint-tenants, executed in Maryland, and acknowledged before two justices of the peace, and of the Common Pleas at

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- Baltimore, with a certificate under the county seal, that there were at that time no superior magistrates or peace officers in the county, allowed to be read in evidence. *M'Intire's lessee v. Ward.* 424
37. Nuisance in obstructing the waters in D. creek, by which plaintiff's lands were overflowed. The nuisance proved was, by erecting a dam in the waters of J. Variance held fatal. *Funk v. Arnold.* 428
38. The loss of a bill of exchange, proved by oath of plaintiff, its existence having been established by other proof. *Meeker et al. v. Jackson.* 422
39. Issue to try the validity of a will: two out of three subscribing witnesses prove it, and no evidence is given of the hand-writing of the third, who is absent out of the state. The declaration of such third person, that the testatrix was insane, shall not be received. *Fox v. Evans.* 506
40. Re-delivery of a deed executed by a *feme covert*, presumed after her husband's death, from circumstances. *Evans v. Evans.* 507
41. In slander, it is sufficient if the substantial slanderous words are laid and proved. If no special damage is laid, proof of particular damages will not be received. *Hersh v. Ringwalt.* 508
42. Mere opinion is no evidence; but the opinion of men of science on facts stated, may be received to inform the jury. *Forbes's lessee v. Caruthers.* 527
43. Letter from the secretary of the land office to the deputy surveyor to make a survey, if lost, and no memorandum of it to be found in the land office, may be proved by parol evidence. *Armstrong's lessee v. Morgan.* 529
44. Every presumption is in favor of an ancient possession. *Crunkleton's lessee v. Evert et al.* 570
45. *Quære*, whether parol evidence may be received, of a mistake made by the clerk of the peace of the county, in registering the name of a negro slave, the original return of the supposed owner being missing. *Campbell v. Wallace.* 572
46. On a promise of indemnity against I, the plaintiff declared that I had recovered against him a certain sum. Proof of recovery of a different sum by I, is no fatal variance, because the recovery is stated only by way of inducement, and not as the ground of the suit. *Repher v. Shane.* 575
47. A second return of survey, on an order of the Board of Property, differing from the first return, may be given in evidence to correct a mistake in the first return. *Eddy's lessee v. Faulkner.* 580
48. The usage of the land office, as to substituting other names in applications, with the consent of the applicant, after 22d April 1794, provided the boundaries are not changed, may be received in evidence. ib.
49. No actual settlement, or transfer thereof, subsequent to an adverse survey on a warrant, can be received in evidence. ib.
50. Copy of a survey not returned nor verified by the surveyor who made it cannot be received in evidence. *Davis's lessee v. White et al.* 586
51. An improver of land, whether plaintiff or defendant, who takes out an office right, and does not insert therein the true date of his improvement, shall not be allowed to give evidence of improvements prior to the time expressed in the office right. *Reigart's lessee v. Haverstock et al.* 591

EXECUTION.

1. No execution shall issue against an insolvent debtor, who had given bond under the act of 4th April 1798, in the same cause. *Shorthouse et al. v. Carothers.* 182

EXECUTOR.

(See Administrator.)

EXECUTORY DEVISE.

(See Contingent Remainder.)

EXTINGUISHMENT.

1. A grants land to B; subject to a yearly rent charge, with right of entry, &c., and B covenants to pay the yearly rent to A, his heirs and assigns, B grant the lands to C, subject to the first rent and to a new created rent payable to himself, and conveys the last rent to W, who afterwards becomes entitled to part of the first rent, under his father's and mother's wills; no part of the first rent is extinguished hereby. *Philips v. Clarkson, et al.* 114

F

FERRY, HIGHWAY, ROAD.

1. Return of the viewers of improved lands taken up by public road, that the damages resulting to the owner are valued at 45 $\frac{1}{2}$, is radically bad. *Ferree v. Meily et al.* 158
2. The soil of improved lands converted into a public road, is not to be valued and paid out of the county stock. *Ferree v. Meily et al.* 158
3. The review of a road is a matter of right. *Berlin Road* 268

FORCIBLE ENTRY.

1. Indictment that B. was peaceably possessed in his demesne as of fee, of certain lands, and continued so seized and possessed, until F. and L. thereof disseized him, and him so disseized and expelled, did keep out &c., held good on error. *Fitch et al. in error v. Rempublicam.* 49

FORFEITURE.

1. A libel is cause of forfeiture of a recognizance for good behaviour, and the guilt of the party may be determined in a suit on the *scire facias*, without a previous conviction. *Respublica v. Cobbet.* 98

G

GAOL.

1. The inspectors of the gaol of the county of Philadelphia, are bound by the law of 4th April 1792, to furnish German passengers arrested, and in the debtors' apartment, with blankets and fuel. *Moore v. Servening.* 448

GOOD BEHAVIOUR.

(See Recognizance.)

H

HABEAS CORPUS.

1. *Habeas corpus* under the act of 1785, does not lie to the bail of one charged with a criminal matter. *Respublica v. Arnold.* 268
2. It persons indicted keep the state witnesses out of the way, they are not entitled to be discharged, though two sessions have intervened under the act of 1785. ib.

HEIR.

(See Descent.)

HIGHWAY.

(See Ferry.)

I

INCOMPATIBILITY.

1. The offices of city recorder or justices of the peace, are not constitutionally incompatible with offices of trust or profit under the United States. *Respublica v. Dallas.* 800

INDICTMENT, INFORMATION. (See forcible Entry. *Habeas Corpus*. § 2.);

1. Indictment will not lie against county commissioners, for refusing to pay money allowed for a bridge, by the sessions and grand jury, under the act of assembly of 15th August 1782; nor under the act of 11th April, 1799, for a bridge erected before the passing of that law. *Respublica v. Meylin et al.* 1
2. A writ of error or certiorari, will not remove an indictment without a special allocatur, or the consent of the attorney general. *Sheffer in error v. Rempublicam.* 89
3. Indictment on the first clause of the 6th section of the act of 22d April 1794, against maiming, leaving out the words "lying in wait;" or, on

- the 2d clause, leaving out the word "voluntary," is defective. *Respublica v. Reiker.* 282
4. The court, in a doubtful case, on a rule to show cause why an information in the nature of a *quo warranto*, should not be filed, will not determine whether an appointment to the office by the governor be constitutional or not. *Respublica v. Dallas.*
5. How perjury may be assigned in an answer to interrogatories, on an attachment for contempt. Such indictment is sufficiently certain, by averring that the party was sworn in due form of law. *Respublica v. Newell.* 407
6. Indictment for a nuisance in obstructing an ancient water course, whereby a public highway was overflowed and spoiled, need not state how far in length or breadth the water stood on the road. *Respublica v. Arnold.* 417
7. Such indictment, laying the nuisance to be in the commonwealth's highway, or road leading from, &c. is good ib.
8. An indictment grounded on a statute, must pursue the description of the offence contained therein. *Respublica v. Tryer.* 451
9. Therefore, an indictment against an insolvent debtor, under the act of 4th April 1798, for fraudulently concealing his estate, with intent to defraud his creditors, but omitting to lay it, "thereby to secure the same" or "to receive or expect any profit, benefit, or advantage thereby," was held ill. ib.
10. The time and place of such fraudulent concealment must be alleged. ib.

INSOLVENT ACTS AND DEBTORS.

1. One who has given bond according to the act of 4th April 1798, in an action on *mesne* process, cannot be taken in execution in the same cause, and if so taken, may be discharged in vacation under a *habeas corpus*. *Short-house et al. v. Carothers.* 182
2. In custody under a *ca. sa.* gave bond with security to comply with the requisites of the insolvent act of 4th April 1798, and accordingly filed his petition in the Court of Common Pleas in June following, and being opposed by his creditors, proceedings were stayed until the next August term, and a new bond given. At the August term it was objected that he had not filed an inventory with his petition; but the case was continued under advisement, and he did not surrender himself. In November term the court discharged the petition. *Quære*, whether the second bond so given is forfeited? *Potter et al. v. Norman.* 395
3. One discharged as an insolvent debtor, cannot support an ejectment for lands previously vested in him, though his trustees have not given bond pursuant to the act of 4th April 1798. *Willis's lessee v. Row.* 520

INSURANCE.

1. Abandonment should be made by assured on a total loss, the first opportunity after knowledge of the loss received; but pestilence of special circumstances may form just exceptions to the general rule. *M'Calmont v. Murgatroyd.* 27
2. Misrepresentation to effect a policy is not to be presumed: what concealment of circumstances will vitiate a policy. *Pine v. Vanuxem et al.* 30
3. A policy of insurance may be explained and controlled by the written order to make insurance. *Norris et al. v. Insurance Company of North America.* 84
4. To subject insurers to a loss, the risk run must correspond with the risk understood, and intended to be run at the time of subscription. ib.
5. Insurers are bound to inform themselves of the course and usage of trade. ib.
6. D. procures a policy of insurance to be made on a vessel for himself and others concerned in the same, and on a loss his executors recover judgment against the underwriter B, who had before obtained judgment against D. B is entitled to a set-off, though it should appear that O. owned half the vessel. *Darrach's executors v. Bayard.* 152
7. A policy of insurance is assignable in equity, and every set-off between the insurer and insured obtains against the assignee, unless, as in the case of bonds, there has been deception on the assignee, on receiving information of the assignment. *Gourdon v. Insurance Company of North America.* 327
8. Letter from a captain to his owner cannot be received on the part of the owner, as proof of the property shipped, without invoices or bills of lading. *Crousillat v. Ball.* 375

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| 9. Captain's protest is evidence on a policy of insurance. | ib. |
| 10. A broker, on effecting a policy, is agent of both parties, and notice of an abandonment to him is sufficient to charge the insurer. | ib. |
| 11. As between insurer and insured, the decree of a foreign Court of Admiralty is conclusive only, when a warranty is inserted in the policy. | ib. |
| 12. Policies in time of peace continue though a war breaks out; but the insured must not do any thing which will add to the risk of the insurer. | ib. |
| 13. On <i>narr.</i> stating a loss by capture, there can be no recovery on the barratry of the master; and where, in a special verdict, the jury have found certain misconduct of the master, the court will not infer that the risk of the insurer was increased thereby. | ib. |
| 14. A privilege of three tons, or 500 dollars in lieu of it, payable at a foreign port to a mate, is insurable property when laid out in goods at such port. <i>Galloway v. Morris et al.</i> | 445 |
| 15. The policy and principles which gave rise to the British statute of 19 Geo. 2, c. 37, have been adopted here, both in courts of justice and by commercial usage. <i>Pritchett v. Insurance Company of N. America.</i> | 458 |
| 16. Owner of a vessel and cargo may fairly insure in a valued policy to two ports in the West Indies, to the amount of the prime cost of the goods and the premium, and the cost of freight thereon to the first port. | ib |

INTEREST.

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| 1. Where one pays money properly chargeable against the state, he is entitled to interest from the time of payment; but in common cases, a demand must be made on the legislature before they can be charged with interest. <i>Milne v. Rempubliam.</i> | 102 |
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INTESTATE, DISTRIBUTION.

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| 1. Though a posthumous child be entitled to a share of his father's lands as if he had died intestate, yet if there be a deficiency of personal estate to pay the debts, he shall not recover against a purchaser under the executors, until he has paid or tendered his proportion of such deficiency, but, if partition cannot be made of the lands, they remain liable for the sum justly due to such child. <i>Kolb's lessee v. Komp.</i> | 164 |
| 2. The personal estate of a mother, being a widow, and dying intestate, under the law of 1705, is subject to the same distribution as that of a father. <i>Dinah Duncan's administrators v. Daniel Duncan's administrator.</i> | 208 |
| 3. One died in 1798, intestate, unmarried, without father, mother, brother or sister, leaving uncles and aunts on the father's and mother's side, and the issue of some who were dead; the whole estate goes to such uncles and aunts, and the issue representing such as are dead, equally. <i>Walker administrator v. Smith.</i> | 480 |

JOINT TENANT.

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| 1. Generally in trespass the plaintiff may recover mesne profits for such time as the defendant may have been in possession; in the case of joint tenants, or tenants in common recovering in ejectment, they are restricted to a reasonable time after judgment. <i>Hare v. Fury.</i> | 13 |
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JUDGE.

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| 1. The Chief Justice and Judges of the Supreme Court are justices of the peace <i>ex officio</i> , and have a power to take recognizances of the good behavior. <i>Respublica v. Cobbett.</i> | 93 |
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JUDGMENT.

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| 1. A judgment on a report of referees, with a stay of execution until a deed for lands should be filed, and approved of by the court, held good on error. <i>Barde's adm'rs v. Wilson.</i> | 149 |
| 2. <i>Quære</i> , whether a sale under a subsequent judgment can affect the security of prior judgments. <i>Keen v. Swaine et al.</i> | 561 |

JUSTICES OF THE PEACE. (See Court, § 3, 4, 5.)

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| 1. The office of a justice of the peace is not constitutionally incompatible with offices of trust or profit under the United States. <i>Respublica v. Dallas.</i> | 800 |
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LANDS, LOCATION, WARRANT, SURVEY. (See Limitation.)

1. Letter of a deputy surveyor to his assistant, to make a deputy survey to his assistant, to make a survey, good *prima facie* evidence. Bell's lessee v. Levers. 28
2. The authority of an assistant surveyor should not be too nicely scrutinized after a great lapse of time. ib.
3. A survey of other lands, on a lost location, is of no more efficacy than a pocketed application, until it be returned. ib.
4. Where one settles and improves lands, and obtains a warrant, and surveys and sells, and his vendee returns the former warrant as unsatisfied, and obtains a new warrant as for unimproved lands, he shall be postponed to an intervening claimant. Carroll's lessee v. Andrews. 59
5. The foundation of a survey must be shown. A survey once made, a new authority is necessary to ground a second survey. Porter's lessee v. Ferguson et al. 60
6. The presumption is, that every survey is made with the party's consent, and shall conclude him, unless there is fraud, or improper conduct in the surveyor, and then the complaint must be followed up in reasonable time. ib.
7. Actual settlements under the law of 8d April 1792, necessarily involve in them a personal residence on the land. M'Laughlin's lessee v. Dawson. 61
8. David Meade and others, under the law of 9th March 1796, are entitled to take out warrants for vacant lands, notwithstanding the acts of 22d April, and 22d September 1794. Meade's lessee v. Haymaker et al. 67
9. A precise warrant will take place of an earlier indescriptive one before survey. ib.
10. It is the duty of a deputy surveyor to return the survey, and his neglect shall not prejudice the party, unless in the case of a shifted warrant or application. ib.
11. The draft of the survey by a proper officer, is strong evidence that the same was fairly and regularly made; and the presumption will stand till the contrary be proved. ib.
12. Improvements under the act of 30th December 1786, and actual settlements under the law of 8d April 1792, have the same meaning, only the latter defines their extent, &c. ib.
13. An improver of land, who takes out an office right, and does not refer therein to his improvement, must *prima facie* be supposed to abandon his improvement. Merchant's lessee v. Millison. 78
14. The presumption that a survey has been made with the party's consent, may be rebutted by circumstantial evidence. ib.
15. Practice of surveyors, as to surveying above ten per cent. surplus lands. —So Elliott's lessee v. Bonnet. 287
16. The law of 30th December 1786, is declaratory of the ancient doctrine of improvement rights. Stevens's lessee v. Tracey. 77
17. Under the act of 8th April 1785, a warrant dated in 1792, shall be preferred to a later one in 1798, though the latter was first delivered to the district surveyor, if the same was not actually surveyed when the oldest warrant came to his hand, and the party was ready with his hands and provisions for the survey. Willink's lessee v. Morris et al. 104
18. Different constructions of the law of 8th April 1785. ib.
19. If one obtains a second survey on a warrant already filed, he thereby abandons his first survey, if the same was not returned into the surveyor general's office before an adverse survey was made. Steel's lessee v. Finley. 169
20. *Quære*, when a survey shall be said to be made on a warrant or application under the 5th section of the limitation act of 26th March 1785. Caruthers's lessee v. Caruthers. 174
21. Improvement rights are equitable claims, which may be affected by the conduct of the improver's widow, during the minority of his children. Mobly's lessee v. Oeker. 200
22. A settlement right may be affected by the conduct of the widow of the settler. Clark's lessee v. Hackethorn. 269

23. An agreement by a widow, in 1786, that a person securing to the family one half of the land improved, by a legal title, shall have the other, may be valid in certain cases. ib.
24. An early settlement, accompanied with a subsequent warrant and survey, is preferable to a prior warrant and survey. *Nicholl's lessee v. Lafferty.* 272
25. Evidence of improvements antecedent to the time of interest commencing, as stated in the warrant, shall not be received. ib.
26. An indescriptive warrant will not affect an improvement made before the same was entered and surveyed; but it must be a personal resident improvement. *Wright v. M'Gehan.* 280
27. An early continued personal resident settlement, is preferable to a later patent. *Elliott's lessee v. Bonnet.* 287
28. A warrant improvidently issued, without any money paid, directed by the surveyor general to a deputy to be executed, and a survey thereon, permitted to be read in evidence. *Dougherty's lessee v. Piper.* 290
29. A warrant issued without money paid, and an inofficial survey thereon, permitted to be read in evidence. *Nicholas's lessee v. Holliday.* 399
30. An application for a warrant in 1763, will not authorize a survey, nor can a warrant directed to one deputy surveyor, be executed by another without his authority. ib.
31. A departure from the usual forms of the land office, affords grounds of suspicion. ib.
32. The lines of a survey may be extended before it is returned, where no injury is done to other claimants. ib.
33. A survey made by a succeeding deputy surveyor on a warrant directed to his predecessor in the same district, may be supported under the practice. *Gripe's lessee v. Baird.* 528
34. But a survey on a warrant, unsigned by the governor for the time being, unless money has been paid thereon to the receiver general, previously, is invalid. ib.
35. Letter from the secretary of the land office to the deputy surveyor to make a survey, if lost, and no memorandum to be found in the land office of it, may be proved by parol evidence. *Armstrong's lessee v. Morgan.* 529
36. On a vague warrant or location, the title vests from the time of survey; but on shifted ones, not until the return of survey, unless the adverse party knew of the survey, prior to the commencement of his right. *Armstrong's lessee v. Morgan.* 529
37. Settlement rights are subject to the same rules of descent as other lands. *Workman's lessee v. Gillespie.* 571
38. A second return of survey, on an order of the Board of Property, differing from the first return, may be given in evidence to correct a mistake in the first return. *Eddy's lessee v. Faulkner.* 580
39. The usage of the land office as to substituting other names in applications, with the consent of the applicant, after the 22d April 1794, provided the boundaries are not changed, may be received in evidence. ib.
40. No actual settlement, or transfer thereof, subsequent to an adverse survey on a warrant, can be received in evidence. ib.
41. Warrants for lands north and west of the Ohio and Allegheny, whereon no actual settlements have been made, by reason of the Indian hostilities within two years after such warrants, are not vacated thereby. ib.
42. An actual settler, who prevents the warrant holder from making a settlement and improvement within the period limited by law, shall not urge the performance of the conditions of settlement in his defence. *Buchanan's lessee v. Myer.* 586
43. An improver of lands, taking out an application including his improvements, and obtaining a survey, is thereby concluded, and cannot hold contiguous lands under his improvement right. *Holmes's lessee v. Hay.* 588
44. An improver of land, whether plaintiff or defendant, who takes out an office right, and does not insert therein the true date of his improvement, shall not be allowed to give evidence of improvements prior to the time expressed in the office right. *Reigart's lessee v. Haverstock et al.* 591

LEGACY, LEGATEE.

1. A legatee in right of his wife, transfers the legacy, and takes a bond therefor. He previously purchases goods of the executors of testator, and they insist on retaining the amount against the assignee of the legacy. This may be given in evidence, on the plea of payment against the equitable assignee of the bond. *Baughman v. Divler*. 9
2. On a will dated in June 1778, devising a legacy of 500*l.*, it is the province of auditors, and not of a jury, to determine whether the depreciation act applies thereto. *Kennedy v. Kennedy*. 15
3. A will beginning with, "I direct all my just debts and funeral expenses to be paid by my executors;" and then devising four pecuniary legacies, and five tracts of land, and concluding "the rest, and residue of estate, real and personal, I give to my four brothers and sisters, A, B, C and D." The pecuniary legacies, on a deficiency of personal estate, are chargeable on the lands. *Tucker v. Hassenclever et al.* 294
4. Whether a legacy of government stock be specific or general, must depend on the texture of the will, and the circumstances of the case. *Cuthbert v. Knight's executors*. 486

LIBEL.

1. Libel is a cause of forfeiture of a recognizance for good behavior. *Respublica v. Cobbett*. 93
2. In a suit against a surety on a recognizance for good behavior, the confession of the principal, that he had published certain libels, may be given in evidence. So, distributing newspapers containing libellous matter, and the clerk of the printer receiving payment for them, is evidence of the publication of the libel. *Respublica v. Davis*. 128
3. In a civil action for a libel against a printer, his inserting the name of the author is no justification, though it may go in mitigation of damages. *Bunkle v. Meyer et al.* 518

LIEN.

1. Money received by delinquent collectors for county rates and levies, under the act of 20th March 1725, or health office taxes under the act of 24th April 1794, or funding taxes of 16th March 1785, remain a lien on their lands, after they should have paid the money into the treasury; *aliter*, of carriage taxes under the act of 20th March 1783. *Fiss's executors v. Emory*. 50
2. The liens of tradesmen, who have built, repaired, or fitted vessels, continue under the act of 27th March 1784, until such vessels proceed to sea, though the owner thereof becomes a bankrupt. *Shoemaker v. Norris*. 392

LIMITATION OF ACTIONS.

1. The limitation act of 26th March 1785, will not bar a recovery on a descriptive warrant without a survey, where proper application has been made for a survey, and the party has been prevented therefrom by a caveat. *Bell's lessee v. Levers*. 23
2. *Quare*, when a survey shall be said to be made, on a warrant or application, under the 5th section of the limitation act of 26th March 1785. *Caruthers's lessee v. Caruthers*. 174
3. It is binding on infants, where there has been no possession of lands improved for seven years next before action brought. *Mobley's lessee v. Ocker*. 200
So, also, *Clark's lessee v. Hackethorn*. 269
4. An improvement right, without a previous possession within seven years before bringing the ejectment, though accompanied by a warrant without survey, and a decision of the Board of Property, nothing being done thereupon after, is barred by the act of limitations of 26th March 1795. *Wallace's lessee v. Dickey*. 282
5. A dormant application whereon no survey has been made, is within the limitation act, though the adverse party, claiming under the same application, has made a survey thereon. *Simpson's lessee v. Williams et al.* 402
6. The 5th section of the limitation act of March 26th 1785, only refers to warrants issued before the law was enacted. *Brice's lessee v. Curran*. . 408

7. An account of the state treasurer, examined, approved, and settled by the comptroller general, and examined and entered by the register general, and approved of by the Supreme Executive Council, and warrant drawn for the balance, cannot be opened and questioned, after one year has elapsed from the time of settlement, under the act of assembly of 18th February 1785. *Respublica v. Rittenhouse's executors.* 548

LOCATION. (See Lands.)

M

MAYHEM.

1. Indictment on the first clause of the 9th section of the act of 22d April 1794, against maiming, leaving out the words "lying in wait," or, on the second clause, leaving out the word "voluntary," is defective. *Respublica v. Reiker.* 282

MONEY.

1. In a suit for lawful money of North Carolina, the court will not permit paper money to be brought into court, unless it be a legal tender. *Shelby v. Boyd et al.* 821

MORTGAGE.

1. B. mortgages land to K., and the same not being recorded in six months sells the same land to A. and receives a bond in part payment, and then assigns over the bond informally to H. A. does not record his deed in six months, and K's mortgage is first recorded, which was the first notice either to A. or H. of the mortgage. Adjudged, that the mortgage cannot be set up as a defence against the equitable assignee of the bond; *aliter*, as to the obligee. *Burke v. Allen.* 351
2. Barom and feme have issue, and mortgage the lands of the feme, without acknowledging the same; the lands of the feme are bound only during the life of the husband. *James v. Lyon.* 471

N

NEGROES.

1. *Indebitatus assumpsit* on a *quantum meruit*, will lie by a free negro, for work, &c., against a person who held him in his service, claiming him as a slave. *Negro Peter v. Steel.* 250
2. Owner of a slave entering his negro in the county where he lives, without expressing the county, the registry is valid. *Cook v. Neaff.* 259
3. Registering a negro, as a slave, without adding for life, is good. *Respublica v. Findlay.* 261
4. *Quære*, whether parol evidence may be received, of a mistake made by the clerk of the peace of the county, in registering the name of a negro slave, the original return of the supposed owner being lost? *Campbell v. Wallace.* 572

NEW TRIAL. (See Trial.)

NOTICE.

1. A deed recorded without a proper probate, is no evidence of notice to subsequent purchasers. *Simons' lessee v. Brown.* 189

NUISANCE.

1. Indictment, for a nuisance in obstructing an ancient water course, whereby a public highway was overflowed and spoiled, need not state how far in length or breadth the water stood on the road. *Respublica v. Arnold.* 417
2. Such indictment, laying the nuisance to be in the commonwealth's highway, or road leading from, &c. is good. ib.
3. Nuisance in obstructing the waters of D. creek, by which plaintiff's lands were overflowed; the nuisance was by erecting a dam in the waters of J., variance held fatal. *Funk v. Arnold.* 428

P

PARTNER.

1. Where a partnership is sworn to by the clerk of one of the partners, the books may be given in evidence to discredit or fortify his testimony. *Moyes v. Brumaux.* 80
2. A dormant partner engaged in a limited concern, and not in the general partnership of the house, for whose use a note was discounted, and afterwards protested, discharged on common bail, and the testimony of one of the partners, a bankrupt, was received by the court to establish the fact. *Bank of Pennsylvania v. Hadfeg et al.* 560

HARTNER.

1. In partition, on the plea of *non tenant insimul*, the defendant may show in evidence an agreed line by the former owners, though his deed poll grants him an undivided interest. *Bates v. M'Crory.* 192

PAYMENT.

1. Defendant, on the plea of payment to a bond, must specify the particulars of the defence, as to want of consideration, fraud, &c., if required by the plaintiff, or he shall be precluded from giving the same in evidence. *Greenwalt v. Born et al.* 6
2. A legatee in right of his wife, transfers the legacy, and takes a bond therefor; he previously purchases goods of the executors of the testator, and they insist on retaining the amount against his assignee of the legacy. This may be given in evidence on the plea of payment, against the equitable assignee of the bond. *Baughman v. Divier.* 9
3. A defendant pays money to one of the attorneys in the cause, (who is not the attorney on record, and who afterwards absconds,) after notice to the contrary; the payment is in his own wrong. *Weist v. Lee.* 47

PERJURY.

1. In an indictment for perjury in answering interrogatories, on a rule to show cause why an attachment should not issue for contempt, in speaking opprobrious words of the court, in a civil suit, the interrogatories may be entitled as between the state and the party, and the perjury be assigned in the answers thereto, before the attachment actually issued. *Respublica v. Newell.* 407
2. Such indictment is sufficiently certain, by averring, that the party was sworn in due form of law. ib.

POWERS, EXECUTION OF.

1. Devise of lands to three sons in fee, but if either of them die without children, then the same to be equally divided among the other children, or be sold and the money divided among them, and executors appointed in trust for the purposes and intents in will, and overseers appointed to see it well performed; on the death of one of the sons without children, the surviving executors may sell the lands devised to him. *Jenkins's lessee v. Stouffer.* 168

PRACTICE.

1. Defendant, on the plea of payment to a bond, must specify the particulars of the defence, as to want of consideration, fraud, &c., if required by the plaintiff, or he shall be precluded from giving the same in evidence. *Greenwalt v. Born et al.* 6
2. Discontinuances are the act of the court, and subject to their discretion. They will not be allowed after a cause has been referred, and the evidence heard by the referees. *Pollock v. Hall.* 24
3. In covenant, on the plea of covenants performed, the defendant must begin the evidence, and conclude to the jury. *Norris et al. v. Insurance company of North America.* 84
4. It is the practice of the court to give a preference to suits on forfeited recognizances. *Respublica v. Cobbett.* 93
5. The certificate of counsel, on an appeal from the Circuit Court, resting on facts not apparent on the record to the Supreme Court, must be made during the sitting of the Circuit Court. *Cay's ex'ra. v. Gibson.* 122

6. *Scire facias* on a recognizance on a writ of error, may issue before the term in which the record is remitted to the Supreme Court, on the affirmance of the judgment in the Court of Errors and Appeals. *Daintry v. Johnston*. 148
7. The court have a control over their rules; and where a view has been had, though founded on the certificate of counsel, where it is improper and unnecessary, it will be discharged with costs. *Nesbitt's lessee v. Kerr*. 194
8. Service of a summons, by leaving a copy with defendants' partner, with whom he has lived, before he went aboard on a trading concern, from whence he is daily expected to return, and has his children now living with him, is good. *Bujac v. Morgan*. 258
9. On an appeal from the Circuit Court to the Supreme Court, counsel must subscribe a certificate, and file the proceedings of the Circuit Court with the prothonotary, before the first day of the next term. *Gallagher v. Hamilton's administrators*. 321
10. No one shall suffer by the mistake of the clerk; therefore bail was relieved, where the principal offered to surrender himself in due time, but was prevented by the *scire facias* being entered of of a prior term. *Hamilton et al. v. Taylor*. 389
11. Where it is objected that witnesses have been summoned unnecessarily, to swell a bill of costs, court will interfere only in cases of manifest oppression. *De Benneville v. De Benneville*. 558
12. Where a defendant removes a cause after it has been at issue two terms, the exception must be taken when the writ is put in, or by motion for proceeding before trial. *Wolff v. Turner*. 559

PRIVILEGE.

1. Privilege of a suitor does not hold, where he has been surrendered by his bail in another cause, and is in actual custody at the time of arrest. *Davis et al. v. Cummins*. 387

PROMISSORY NOTE.

1. An alteration of the date of a promissory note by payee, whereby the time of payment is retarded, and afterwards discounted with innocent persons by the payee on indorsing it, avoids the note. *Bank of the United States v. Russell et al.* 391

PURCHASER.

1. A deed recorded without a proper probate, is no evidence of notice to subsequent purchasers. *Simons' lessee v. Brown*. 186
2. Evidence of the debt on which a sheriff's sale of lands was founded being paid previous to the sale, shall not be received to affect the title of a stranger who has purchased: *aliter*, if the plaintiff in the execution is the purchaser. *Samms's lessee v. Alexander*. 268
3. A purchaser for valuable consideration, without notice of a trust, is not subject to it. *Clarke's lessee v. Hackethorn*. 269

R

RECOGNIZANCE, SURETY, &c.

1. Recognizance of the good behavior may be taken by the Chief Justice, or any Judge of the Supreme Court; and such a recognizance towards the commonwealth, and all the liege people, is good. *Respublica v. Cobbett*. 93
2. A libel is a cause of forfeiture of such recognizance, and the guilt of the party may be determined on a suit on the *scire facias*, without a previous conviction. ib.
3. And what is evidence of such forfeiture, and publication of libel. See *Respublica v. Davis*. 128

REFEREES. (See Arbitration.)

RENT.

1. A grants lands to B. subject to a yearly rent charge, with right of entry into the premises, to hold until the rent is paid; and B. covenants to pay

the yearly rent to A, his heirs and assigns. B. grants the lands to C. subject to the first rent, and to a new created rent payable to himself, and conveys the last rent to W., who afterwards becomes entitled to part of the first rent under his father's and mother's wills; no part of the first rent is extinguished thereby. *Philips v. Bonsall*. 124

REPLEVIN.

1. Where a replevin is brought for goods distrained for rent, and the cause is referred, and the referees find a sum due for rent beyond the time of distress, the report will be set aside. *Shaw v. Atkinson et al.* 48
2. Replevin will not lie for goods seized for non-payment of the city water tax. *Stiles v. Griffith*. 82

ROAD. (See Ferry.)

S

SET-OFF. (See Defalcation.)

SHERIFF, SHERIFF'S DEEDS. (See Escape.)

1. Court on the trial of lands sold by sheriff, will not examine whether the jury who condemned them acted erroneously, or whether the same were sold at an undervalue; but it is essential, that the sheriff's deed should be acknowledged in open court, after the return day of the writ. *Murphy's lessee v. M'Cleary et al.* 406
2. A sale by a sheriff on a *levari facias*, on a second mortgage, free of all incumbrances, confirmed under the special circumstances of the case *Keen v. Swaine et al.* 561
3. *Quare*, whether a sale under a subsequent mortgage or judgment, can effect the security of prior mortgages or judgments. ib.

SHIP, MASTER AND OWNERS OF.

1. A ship's agent in a foreign port, a witness to prove the shippers of the goods. *Andre et al. v. Care*. 101
2. Where French property has been covered in an American bottom, without the knowledge of the captain or his owner, but with the assent of the ship's agent, the party is entitled to the net proceeds of the property. ib.
3. Master of a ship borrowing reasonable sums abroad, at common interest, for repairs, &c., in cases of clear and manifest necessity, may thereby make his owners liable, without any hypothecation. *Wainwright v. Crawford*. 131
4. The liens of tradesmen, who have built, repaired, or fitted vessels, continue under the act of 27th March 1784, until such vessels proceed to sea, though the owner thereof becomes a bankrupt. *Shoemaker v. Norris*. 392
5. Though the captain may discharge a mate for misconduct in a foreign port, yet the grounds for doing it must be very strong. *Golloway v. Morris et al* 445
6. A mariner loses his wages on a capture from the last port of delivery, and during half of the time of his continuance there. ib.

SLANDER.

1. In slander, it is sufficient if the substantial slanderous words are laid and proved. *Hersh v. Ringwalt*. 508
2. If one assert a slander generally, without adding who told it to him, it is actionable; and even then it must be such a report as will induce a reasonable belief. ib.
3. If no special damage is laid, proof of particular damages will not be received. ib.

SUPREME COURT. (See Court.)

SURETY AND PRINCIPAL.

1. A creditor neglecting to sue his principal debtor, on the application of a surety, does not thereby discharge the surety. *Dehuff v. Turbett's executors*. 157

SURETY OF THE PEACE, &c. (See Recognizance.)

SURVEY. (See Lands.)

T

TAXES. (See Lien, Replevin.)

1. Want of proof that the names of the commissioners of the county had been returned to the sessions, will not invalidate a sale for non-payment of taxes; but there must be due proof of assessment and advertisement. *Blair's lessee v. Caldwell.* 284
2. The valuation by the assessors under the law of 11th April 1799, is binding on the county commissioners, and they cannot revise or alter it. *Respublica v. Deaves.* 455

TENDER MONEY IN COURT.

1. In a suit for lawful money of North Carolina, the court will not permit paper money to be brought into court, unless it be a legal tender. *Shelby v. Boyd et al.* 821

TRESPASS, ACTION OF.

1. Generally in trespass the plaintiff may recover ~~mess~~ profits for such time as defendant may have been in possession; but in the case of joint tenants, or tenants in common, recovering in ejectment, they are restricted to a reasonable time after judgment. *Hare v. Fury.* 18

TRIAL NEW TRIAL.

1. It is the practice of the court to give a preference in trial to suits on forfeited recognizances. *Respublica v. Cobbett.* 98
2. A second new trial awarded, after trial by special jury and view, without costs; improper evidence, which was afterwards overruled by the court, having been disclosed to the jury on the view. *Stewart's lessee v. Richardson.* 200
3. The court will not grant a new trial, unless they are satisfied injustice has been done. *Jordan et al. v. Meredith.* 818
4. A talesman sworn on the jury, after being struck off the list of special jurors, is no ground for awarding a new trial. ib.
5. New trial granted, where in a suit on a note by indorsee against indorser, the court submitted to the jury, the intentions of the plaintiff, in discharging the drawer out of custody on a *ca. sa.* issued against him *M'Fadden v. Parker et al.* 496

TURNPIKE.

1. The turnpike company, under the act of 9th April 1792, are not bound to make compensation for the soil, gravel, or stone in the track of the road; nor to put up new fences where the road runs across the field, and the fence is thrown down. *Aliter*, where it goes lengthwise along the road, or for damages done to real improvements on the tract *M' Olenachan v. Curwin.* 862

W

WARRANT. (See Lands.)

WARRANTY.

1. If one sells an unsound horse, knowingly, and conceals that circumstance, and receives a sound price, he is answerable for the deceit; *aliter*, if he was ignorant that the horse was unsound. But if one sells with warranty, he is answerable whether he knew the horse to be unsound or not *Kimmel v. Lichty.* 262

WASTE.

1. Tenant in dower may clear woodland assigned to her in dower, provided she does not exceed a just proportion of the whole tract. *Hastings v. Crunckleton et al.* 261
2. What would be deemed waste in England, could not receive that appellation here. ib.

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